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Secret detentions and illegal transfers of detainees involving Council of Europe member states: second report

Explanatory memorandum*

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* The Rapporteur, the secretariat and the translators had to work in extremely difficult conditions because of the lack of time due to the delays in receiving certain information. This explains why there may be some linguistic mistakes and imprecision. The Rapporteur wishes to apologise for this.

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Introductory remarks – an overview

1. What was previously just a set of allegations is now proven: large numbers of people have been abducted from various locations across the world and transferred to countries where they have been persecuted and where it is known that torture is common practice. Others have been held in arbitrary detention, without any precise charges levelled against them and without any judicial oversight – denied the possibility of defending themselves. Still others have simply disappeared for indefinite periods and have been held in secret prisons, including in member states of the Council of Europe, the existence and operations of which have been concealed ever since.

2. Some individuals were kept in secret detention centres for periods of several years, where they were subjected to degrading treatment and so-called "enhanced interrogation techniques" (essentially a euphemism for a kind of torture), in the name of gathering information, however unsound, which the United States claims has protected our common security. Elsewhere, others have been transferred thousands of miles into prisons whose locations they may never know, interrogated ceaselessly, physically and psychologically abused, before being released because they were plainly not the people being sought. After the suffering they went through, they were released without a word of apology or any compensation – with one remarkable exception owing to the ethical and responsible approach of the Canadian authorities – and also have to put up with the opprobrium of doubts surrounding their innocence and, right here in Europe, racist harassment fuelled by certain media outlets. These are the terrible consequences of what in some quarters is called the "war on terror."

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3. While the strategy in question was devised and put in place by the current United States administration to deal with the threat of global terrorism, it has only been made possible by the collaboration at various institutional levels of America's many partner countries. As was already shown in my report of 12 June 2006 (PACE Doc 10937), these partners have included several Council of Europe member states. Only exceptionally have any of them acknowledged their responsibility – as in the case of Bosnia and Herzegovina, for instance – while the majority have done nothing to seek out the truth. Indeed many governments have done everything to disguise the true nature and extent of their activities and are persistent in their unco-operative attitude. Moreover, only very few countries have responded favourably to the proposals made by the Secretary General of the Council of Europe at the end of the procedure initiated under Article 52 of the European Convention of Human Rights ("ECHR") (see document SG(2006)01).

4. The rendition, abduction and detention of terrorist suspects have always taken place outside the territory of the United States, where such actions would no doubt have been ruled unlawful and unconstitutional. Obviously, these actions are also unacceptable under the laws of European countries, who nonetheless tolerated them or colluded actively in carrying them out. This export of illegal activities overseas is all the more shocking in that it shows fundamental contempt for the countries on whose territories it was decided to commit the relevant acts. The fact that the measures only apply to non-American citizens is just as disturbing: it reflects a kind of "legal apartheid" and an exaggerated sense of superiority. Once again, the blame does not lie solely with the Americans but also, above all, with European political leaders who have knowingly acquiesced in this state of affairs.

5. Some European governments have obstructed the search for the truth and are continuing to do so by invoking the concept of "state secrets". Secrecy is invoked so as not to provide explanations to parliamentary bodies or to prevent judicial authorities from establishing the facts and prosecuting those guilty of offences. This criticism applies to Germany and Italy, in particular. It is striking to note that state secrets are invoked on grounds almost identical to those advanced by the authorities in the Russian Federation in its crackdown on scientists, journalists and lawyers, many of whom have been prosecuted and sentenced for alleged acts of espionage. The same approach led the authorities of "the former Yugoslav Republic of Macedonia" to hide the truth and give an obviously false account of the actions of its own national agencies and the CIA in carrying out the secret detention and rendition of Khaled El-Masri.

6. Invoking state secrets in such a way that they apply even years after the event is unacceptable in a democratic state based on the rule of law. It is frankly all the more shocking when the very body invoking such secrets attempts to define their concept and scope, as a means of shirking responsibility. The invocation of state secrets should not be permitted when it is used to conceal human rights violations and it should, in any case, be subject to rigorous oversight. Here again, Canada seems to demonstrate the right approach, as will be seen later in this report.

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7. There is now enough evidence to state that secret detention facilities run by the CIA did exist in Europe from 2003 to 2005, in particular in Poland and Romania. These two countries were already named in connection with secret detentions by Human Rights Watch in November 2005. At the explicit request of the American government, the Washington Post simply referred generically to "eastern European democracies", although it was aware of the countries actually concerned. It should be noted that ABC did also name Poland and Romania in an item on its website, but their names were removed very quickly in circumstances which were explained in our previous report. We have also had clear and detailed confirmation from our own sources, in both the American intelligence services and the countries concerned, that the two countries did host secret detention centres under a special CIA programme established by the American administration in the aftermath of 11 September 2001 to "kill, capture and detain" terrorist suspects deemed to be of "high value". Our findings are further corroborated by flight data of which Poland, in particular, claims to be unaware and which we have been able to verify using various other documentary sources.

8. The secret detention facilities in Europe were run directly and exclusively by the CIA. To our knowledge, the local staff had no meaningful contact with the prisoners and performed purely logistical duties such as securing the outer perimeter. The local authorities were not supposed to be aware of the exact number or the identities of the prisoners who passed through the facilities – this was information they did not "need to know." While it is likely that very few people in the countries concerned, including in the governments themselves, knew of the existence of the centres, we have sufficient grounds to declare that the highest state authorities were aware of the CIA's illegal activities on their territories.

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9. We are not an investigating authority: we have neither the powers nor the resources. It is not therefore our aim to pass judgments, still less to hand down sentences. However, our task is clear: to assess, as far as possible, allegations of serious violations of human rights committed on the territory of Council of Europe member states, which therefore involve violations of the European Convention on Human Rights. We believe we have shown that the CIA committed a whole series of illegal acts in Europe by abducting individuals, detaining them in secret locations and subjecting them to interrogation techniques amounting to torture.

10. In most cases, the acts took place with the requisite permissions, protections or active assistance of government agencies. We believe that the framework for such assistance was developed around NATO authorisations agreed on 4 October 2001, some of which are public and some of which remain secret. According to several concurring sources, these authorisations served as a platform for bilateral agreements, which – of course – also remain secret.

11. In our view, the countries implicated in these programmes have failed in their duty to establish the truth: the evidence of the existence of violations of fundamental human rights is concrete, reliable and corroborative. At the very least, it is such as to require the authorities concerned at last to order proper independent and thorough inquiries and stop obstructing the efforts under way in judicial and parliamentary bodies to establish the truth. International organisations, in particular the Council of Europe, the European Union and NATO, must give serious consideration to ways of avoiding similar abuses in future and ensuring compliance with the formal and binding commitments which states have entered into in terms of the protection of human rights and human dignity.

12. Without investigative powers or the necessary resources, our investigations were based solely on astute use of existing materials – for instance, the analysis of thousands of international flight records – and a network of sources established in numerous countries. With very modest means, we had to do real "intelligence" work. We were able to establish contacts with people who had worked or still worked for the relevant authorities, in particular intelligence agencies. We have never based our conclusions on single statements and we have only used information that is confirmed by other, totally independent sources. Where possible we have cross-checked our information both in the European countries concerned and on the other side of the Atlantic or through objective documents or data. Clearly, our individual sources were only willing to talk to us on the condition of absolute anonymity. At the start of our investigations, the Committee on Legal Affairs and Human Rights authorised us to guarantee our contacts strict confidentiality where necessary. This willingness to grant confidentiality to potential "whistleblowers" was also communicated to Mr Franco Frattini, Vice-President of the European Commission with responsibility for the area of freedom, security and justice, so that he could also notify the relevant ministers in EU countries. Guarantees of confidentiality undoubtedly contributed to a climate of trust and made it possible for many sources to agree to talk to us. The individuals concerned are not prepared at present to testify in public, but some of them may be in the future if the circumstances were to change.

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13. The Polish authorities recently criticised us for not travelling to their country to visit the facility suspected of having housed a detention centre. However, we see no point in visiting the site: we are not forensic science experts and we have no doubts about the capability of those who would have removed any traces of the prisoners' presence. Moreover, a meeting at the site would only have been worthwhile if the Polish authorities had first replied to the questions we put to them on numerous occasions and to which we are still awaiting replies.

14. We are fully aware of the seriousness of the terrorist threat and the danger it poses to our societies. However, we believe that the end does not justify the means in this area either. The fight against terrorism must not serve as an excuse for systematic recourse to illegal acts, massive violation of fundamental human rights and contempt for the rule of law. I hold this view not only because methods of this nature conflict with the constitutional order of all civilised countries and are ethically unacceptable, but also because they are not effective from the perspective of a genuine long-term response to terrorism.

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15. We have said it before and others have said it much more forcefully, but we must repeat it here: having recourse to abuse and illegal acts actually amounts to a resounding failure of our system and plays right into the hands of the criminals who seek to destroy our societies through terror. Moreover, in the process, we give these criminals a degree of legitimacy – that of fighting an unfair system – and also generate sympathy for their cause, which cannot but serve as an encouragement to them and their supporters.

16. The fact is that there is no real international strategy against terrorism, and Europe seems to have been tragically passive in this regard. The refusal to establish and recognise a functioning international judicial and prosecution system is also a major weakness in our efforts to combat international terrorism. We also agree with the view expressed by Amnesty International in its recent annual report: governments are taking advantage of the fear generated by the terrorist threat to impose arbitrary restrictions on fundamental freedoms. At the same time, they are paying no attention to developments in other areas that claim many more lives, or they display a disconcerting degree of passivity. We need only cast our minds to human trafficking or the arms trade: how is it possible, for example, that aeroplanes full of weapons continue to land regularly in Darfur, where a human tragedy with tens of thousands of victims is unfolding?

17. In our view, it is also necessary to draw attention to an aspect we believe to be very dangerous: the legitimate fight against terrorism must not serve as a pretext for provoking racist and Islamophobic reactions among the public. The Council of Europe has rightly recognised the fundamental importance of intercultural and interfaith dialogue. The member states and observers really should carry these efforts forward and maintain the utmost of vigilance on the issue. Any excesses in this respect could have disastrous consequences in terms of an expanded future terrorist threat.

18. In the course of our investigations and through various specific circumstances, we have become aware of certain special mechanisms, many of them covert, employed by intelligence services in their counter-terrorist activities. It is not for us to judge these methods, although in this area, too, great liberties appear to be taken with lawfulness. Many of these methods give rise to chain reactions of blackmail and lies between different agencies and institutions in individual states, as well as between states. Therein may lie at least a partial explanation for certain governments' fierce opposition to revealing the truth. We cannot go into the details of this phenomenon without putting human lives at risk. Let me reiterate that we are fully convinced of the strategic importance of the work of intelligence services in combating terrorism. However, we believe equally strongly that the relevant agencies need to be subject to codes of conduct, accompanied by robust and thorough supervision.

19. With the mandate assigned to us, we believe that the Assembly has reached the limits of its possibilities. The resources at our disposal to address the issues presented to us are totally inadequate for the task. The Council of Europe should give serious consideration to equipping itself with more effective and more binding instruments for dealing with such grave instances of massive and systematic violations of human rights. This is more necessary now than ever before, since it is clear that we are facing a worrying process of the erosion of fundamental freedoms and rights.

20. We must condemn the attitude of the many countries that did not deem it necessary to reply to the questionnaire we sent them through their national delegations. Similarly, NATO has never replied to our correspondence.

21. In presenting this report, the Rapporteur expresses his gratitude to the staff of the Committee's secretariat for their outstanding commitment and dedication. Very special thanks and acknowledgment go to the young staff member who was specifically assigned to this investigation: he has displayed absolutely amazing analytical skills and tenacity.

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I. The "dynamics of truth"

I. How President Bush's disclosure of the Central Intelligence Agency (CIA) secret detention programme has accelerated the "dynamics of truth"

22. When President Bush decided on 6 September 2006 to reveal the existence of the covert programme implemented by the CIA to arrest, detain and interrogate overseas high-value terrorist suspects [1], he simply glossed over the most delicate aspects, such as the implementation means chosen and (not) obtaining the prior support from the United States Congress for his Administration's "war against terrorism".

23. President Bush's disclosure was carefully worded so as to provide very little factual insight that was genuinely new or unknown. It was instead couched in imperative terms that portrayed the President as a strong Commander-in-Chief trying to prevent threats to the United States by methods - such as the CIA's interrogation techniques - which were *"tough, safe, and lawful, and necessary"*.

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24. The end was portrayed as paramount – *"we're getting vital information necessary to do our jobs, and that's to protect the American people and our allies"*; the means of getting there inconsequential – *"I cannot describe the specific methods used – I think you understand why"*.

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25. Just under six weeks later, the US Congress responded to President Bush's clarion call [2] by passing the Military Commissions Act 2006 into law. As President Bush had expressly requested, the legislation draws distinctions between United States citizens and non-citizens, strips away the time-honoured right of detainees to challenge the basis for their detention (habeas corpus), and insulates US service personnel from prosecution for violations of Common Article 3 of the four Geneva Conventions. The process that lay ahead for captured terrorist suspects was thereby mapped out, whilst the Administration tried to cover the tracks that had led them there.

26. The "limited disclosures" of 6 September 2006, afforded a fresh focus to the mandate of my inquiry. One thing was now certain, personally acknowledged by the President of the United States: the existence of secret detention centres, which I had already confirmed in my June 2006 report. We are, however, faced with unresolved allegations that Council of Europe member States have colluded with the United States in serious human rights violations such as enforced disappearances, incommunicado (secret) detentions, and torture or cruel, inhuman and degrading treatment. President Bush's assertion that Europeans too had benefited from the programme [3] - which has not been substantiated by any evidence – must be put into its proper perspective if it were shown that we had forsaken our democratic values and the rule of law in order to share in those benefits.

27. In my view the protection of fundamental human rights is every bit as important as the preservation of national security cited by President Bush; indeed I hold these two objectives to be complementary, mutually reinforcing and in no way contradictory.

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[1] The White House, Office of the Press Secretary, "Remarks by the President on the Global War on Terror" (*War against terrorism is a struggle for freedom and liberty, Bush says*), speech delivered in the East Room of the White House, 06.09.2006; hereafter "Remarks by President Bush, 06.09.2006".

[2] *Idem*. The transcript shows that President Bush struck a chord with his White House audience, which included relatives of victims of the 9/11 attacks: *"Congress is in session just for a few more weeks, and passing this legislation ought to be the top priority. (Applause.) For the sake of our security, Congress needs to act, and update our laws to meet the threats of this new era. And I know they will."*

[3] *Ibid*. *"Information from the terrorists questioned in this program helped unravel plots and terrorist cells in Europe and other places. It's helped our allies to protect their people from deadly assaults."*

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28. If we are to understand clearly the relationship between human rights and national security imperatives for the future, then we cannot content ourselves with partial truths about how the policies in question have been developed and implemented in the past. It is therefore our duty to get right to the bottom of the CIA's secret detention programme in all its systemic components. The programme must not simply pass into history as a policy that seemed to breach our supposedly inviolable human rights, but about which we never learned the truth and for which we never exercised political and legal accountability. We have a right and the duty to know the truth and to analyse critically the means and methods being used in our name towards the stated goal of enhancing our common security. It is therefore indispensable to clarify the precise operational and legal basis of the CIA's covert programme, and in particular to establish the extent to which Council of Europe member states were involved.

29. Building upon the June 2006 interim report[4], I have now concentrated on placing the CIA programme properly within the "global spider's web", the image I used to describe the system of secret detentions and detainee transfers spun out around the world by the US Government and its allies. In this context, our interest has been concentrated on the role played by the member States of the Council of Europe that acted as "hosts" for CIA secret detentions.

30. As this report will make clear, the HVD programme has depended on extraordinary authorisations – unprecedented in nature and scope – at both national and international levels. The secret of its very existence was successfully guarded for several years, and until today, very little detail has been published about the terms used to refer to it, the way the system has operated, the underlying authorisations and arrangements that have sustained it, or even the reasons as to why it has so successfully been covered up.

31. Questions such as where the detention sites have been located and what conditions the detainees have been kept in were declared last year by President Bush to be too sensitive for him to answer officially, on the grounds that "*doing so would provide our enemies with information they could use to take retribution*".[5]

32. Indeed, even when the revelations of secret detentions in "several democracies in Eastern Europe" first emerged in November 2005,[6] the publication responsible for breaking the story, *The Washington Post*, made a decision not to publish the names of the states which had hosted CIA "black sites", although it was aware of this information. *The Post's* decision followed a meeting at the White House and an explicit appeal from the US Government to refrain from naming the countries involved.[7] *The Post*'s Staff Writer Dana Priest, who wrote the article in question, explained the rationale behind the newspaper's decision in the following terms:

> "*Political embarrassment was not a consideration; it really turned on the safety and co-operation questions. We did not publish the names of the countries involved because those countries were co-operating on other efforts that were not controversial, some of which the Post knew about from independent sources and which we considered to be valuable. Knowing those efforts to be vital to our international programmes, we thought that those efforts might stop if the countries' names were published, and that this would not be good.*"[8]

[4] See Dick Marty, Committee on Legal Affairs and Human Rights, Council of Europe Parliamentary Assembly, "Alleged secret detentions and unlawful inter-state transfers of detainees involving CoE member States", Doc. 10957, 12.06.2006, available at http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc06/EDOC10957.htm (hereinafter "Marty Report 2006, Council of Europe Doc. 10957").

[5] Remarks by President Bush, 08.09.2006, *supra* note 3.

[6] See Dana Priest, "CIA Holds Terror Suspects in Secret Prisons – Debate is Growing within Agency about Legality and Morality of Overseas System set up after 9/11", *The Washington Post*, 02.11.2005.

See Howard Kurtz, "Bush Presses Editors on Security", *The Washington Post*, 28.12.2005, available at http://www.washingtonpost.com/wp-dyn/content/article/2005/12/28/AR2005122800885_pf.html. For further commentary, see also Marty Report 2006, section 1.3, at p. 9.

[7] Dana Priest, speaking at the seminar entitled "Secrecy and Government: America Faces the Future", hosted by the Center on Law and Security, NYU School of Law, New York, 12.04.2007.

33. While one might understand this decision, I have chosen to adopt a different position from that of *The Washington Post* on this issue, whilst maintaining a strict policy of confidentiality with regard to my individual sources. It should also be borne in mind that the very earnest American NGO Human rights Watch had explicitly cited Poland and Romania among the countries in which there had been secret detention centres. Moreover, it is difficult to accept that the reasons given at the time by the *Washington Post* are still valid today.

II. The responsibility to provide a truthful account and the importance of confidential sources

34. Especially in light of its unparalleled pedigree for protecting and promoting human rights on our continent, the Council of Europe holds a unique responsibility in providing a truthful account. It has been said that the paradigm of US detainee treatment in the course of the "war on terrorism" has been to carry out its most heinous acts on foreign territories – including in Europe – because it knows that such acts would not be permissible at home under the laws and Constitution of the United States. This is a paradigm of political expediency. But how not to see in it a form of contempt towards other countries, notably Cuba (Guantanamo) and Europe: what is not good enough for the United States is for others!

35. In direct response, the paradigm of this report is one based on principles and values. We assert that in order to retain the moral authority necessary to defeat the global terrorist threat, we must ensure that every detainee in our custody – notwithstanding the acts of which he is accused, or whether he is held in Europe or elsewhere – is accorded the same fundamental human rights we would expect to be accorded ourselves and which, moreover, we uphold for even the worst criminals. Not even war authorises conduct of any sort; for example, the Geneva Conventions, the cornerstone of international humanitarian law laying down the limits to the barbarity of war, also prohibit secret detention centres.

36. From the outset of my mandate as Rapporteur on this issue, I have argued that transparency and accountability would in fact prove to be healthy for all the member States of the Council of Europe, not least for the countries which have hosted CIA "black sites".

37. The perpetual cycle of allegations and unsubstantiated rumours since November 2005 has merely served to fuel mutual suspicion and distrust between our Governments and peoples. The uncertainty has disrupted open political debate and provided an unwelcome distraction from the most urgent task of developing more viable democratic strategies to combat the growing terrorist threat in accordance with the rule of law.

38. Thus my decision to name the countries concerned should not be construed as an attempt to single out scapegoats or to drive a wedge between members of the European family. On the contrary, my investigations demonstrate clearly that responsibility is broadly shared on both sides of the Atlantic and on our continent.

39. From the very beginnings of the "war on terror" advocated by the United States, European governments could not ignore its true nature ; all the members and partners of NATO signed up to the same "permissive" – not to say illegal – terms that allowed CIA operations to permeate throughout the European continent and beyond; all knew that CIA practices for the detention, transfer and treatment of terrorist suspects left open considerable scope for abuses and unlawful measures; yet all remained silent and kept the operations, the practices, their agreements and their participation secret.

40. Now it is time for the member States of the Council of Europe to muster a similar collective spirit in acknowledging the truth about the past and regrouping to face the considerable challenges to be faced in the future. The methods used not only proved to be of questionable usefulness, but above all they also gave a semblance of legitimacy to terrorist movements and even gave rise to some feeling of sympathy for them.

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41. As Council of Europe Rapporteur I have talked persistently about my belief in the "dynamics of truth" – that each drop of truth will lead forward to another drop of truth, and that a steady trickle will ultimately develop into an irreversible flow. Seen in this regard, my report of June 2006, which mapped out the "global spider's web" and exposed CIA "rendition circuits" for the first time, was but a small contribution to a pool of outstanding investigative work by journalists[9] and non-governmental organisations[10] that continues to grow to the present day.

42. Yet while the momentum was gathering last year, we were perfectly aware that we would still have to overcome formidable obstacles in order to get to the truth about the CIA programme of secret detentions in Europe. State secrecy has been systematically invoked at national level in several instances both to deny us access to classified documents and to thwart action taken by the competent judicial and parliamentary authorities.[11] Moreover, as I demonstrate later in this report,[12] the secrecy and security of information policies adopted by states in the framework of the North Atlantic Treaty Organisation (NATO) are just as impenetrable when applied as barriers to transparency as they have proven since they were selected to act as coverage for CIA clandestine operations.

43. To encourage even a minor departure from strict adherence to these regimes of silence, secrecy and cover-up would require a rare convergence of factors. The first signs of cracks would have to appear in alliances that had hitherto been absolutely watertight. The motivation for insiders on one or both sides of the Atlantic to talk to us would surely derive only from their fear of betrayal – either by their colleagues, their political masters or their transatlantic partners.

44. The catalyst for those involved in the HVD programme to talk candidly to our team appears ultimately to have come from the American side – albeit that a degree of ambiguity about who was "allowed" to say what appears to have worked in our favour. My representative, who was on-the-spot in Washington, DC when President Bush disclosed the existence of the CIA's covert overseas detention and interrogation programme, received an off-the-record briefing.

45. Thereafter, one of the most challenging aspects of our investigation has been our effort to access the structures where the information is held within the different European states. Towards this end our team has undertaken visits and developed sources in both the political and intelligence spheres in various countries, sometimes pursuing multiple contacts over a period of months.

[9] In particular, I wish to recognise the following journalistic contributions, which depended on original investigative work to bring to light original facts and new dimensions to the global system of secret detentions and detainee transfers: Stephen Grey on extraordinary renditions (see "America's Gulag," in *The New Statesman*, 17.05.2004, "US Accused of Torture Flights," in *The Sunday Times*, 14.11.2004, and "Les Etats-Unis inventent la délocalisation de la torture," in *Le Monde Diplomatique*, April 2005); Dana Priest on CIA programmes, including secret detentions in Europe ("CIA Holds Terror Suspects in Secret Prisons – Debate is Growing Within Agency about Legality and Morality of Overseas System set up after 9/11," in *The Washington Post*, 2.11.2005; and "Foreign Network at Front of CIA's Terror Fight – Joint Facilities in Two Dozen Countries account for bulk of Agency's post-9/11 successes," in *The Washington Post*, 18.11.2005); Jane Mayer on rendition policies, interrogation techniques and torture memos ("Outsourcing Torture: The secret history of America's 'extraordinary rendition' programme," in *The New Yorker*, 14 and 21.02.2005, "A Deadly Interrogation – Can the CIA legally kill a prisoner?" in *The New Yorker*, 14.11.2005; and "The Memo – How an internal effort to ban the abuse and torture of detainees was thwarted," in *The New Yorker*, 27.02.2006); Brian Ross and Richard Esposito on enhanced interrogations and the clear-out of European sites ("CIA's Harsh Interrogation Techniques Described – Sources Say Agency's Tactics lead to Questionable Confessions, Sometimes to Death", *ABC News*, 18.11.2005, and "Sources Tell ABC News Top Al-Qaeda Figures held in Secret CIA Prisons: 10 out of 11 Terror Leaders subjected to "Enhanced Interrogation Techniques," *ABC News*, 5.12.2005); Don Van Natta Jr. and Souad Mekhennet on the El-Masri case ("German's Claim of Kidnapping brings Investigation of US link," in *The New York Times*, 8.01.2005); Nick Hewitt on the cover-up regarding secret flights into Poland ("Chasing Shadows," *BBC Radio 4*, 2.01.2007), and *The Chicago Tribune* on undeclared flights in both Poland and Romania (John Crewdson, "Elusive jet may hold clue to secret prisons – Mystery Gulfstream landed in Romania," in *The Chicago Tribune*, 13.08.2006; and Tom Hundley, "Remote Polish airstrip holds clues to secret CIA flights," 06.02.2007).

[10] I am deeply grateful to all our allies in the non-governmental field, whose dedication to the cause and tireless support for my inquiry – much of it behind the scenes – has proven invaluable. For their professional approach throughout the last two years and for their reporting, research and representations too extensive to enumerate individually here, I wish to thank in particular: the American Civil Liberties Union, Amnesty International, the Brennan Centre for Justice at NYU School of Law, the Centre for Human Rights and Global Justice at NYU School of Law, the Centre for Constitutional Rights, Human Rights First, Human Rights Watch, the International Commission of Jurists, REPRIEVE, Statewatch and the Swedish Helsinki Committee for Human Rights. I salute your work and that of the many other NGOs active in the field who have supported me anonymously or whose names I have inadvertently failed to mention.

[11] Pertinent examples of the invocation of state secrecy in at least two different jurisdictions are provided in the section entitled "A case study of Khaled El-Masri," at section VI.) later in this report.

[12] See section entitled "Preserving Secrecy and the NATO Security Policy," at section III.II. later in this report.

46. Consequently, all of the conclusions drawn in this report rely upon multiple sources, which validate and corroborate one another. Indeed, in the course of my inquiry, our team has spoken – and in many cases conducted interviews – with over 30 one-time members (serving, retired or having carried out contract work) of intelligence services in the United States and Europe.

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47. However, by necessity, the majority of these conversations have taken place under conditions of strict confidentiality, in order to enable the individuals concerned to be able to speak freely and without fear of consequence.

48. It is my firm conviction that what I publish here poses no threat to the individual or collective safety of any of my sources, some of whom have taken considerable personal risks to speak to us. Thus I do not identify by name the sources of many specific quotes and other items of information, nor do I attribute them too specifically to the office held by the speaker, such that no reader is able to identify the individuals who spoke in confidence to us and whose anonymity, at least for the moment, must be preserved.

49. These rules on confidentiality, imposed upon us because of the lack of collaboration from the states concerned, cannot and should not prevent me from naming individual office-holders who occupied key positions of power at the relevant times and who thus answer for the decisions they took on behalf of their states.

50. In the sections that follow, I have therefore drawn upon multiple sources in the US and European intelligence communities in an attempt to lay bare the anatomy of this controversial programme. In so doing, I believe that I have been able to provide the most in-depth account to date of the conceptual development of the HVD programme, the NATO framework so vital to the programme's operations, details of the bilateral arrangements for its operations, and important strands of evidence that belie the repeated denials of high-ranking officials – including several Presidents and Prime Ministers – about what took place and what they knew. Certainly we are far from knowing the whole truth. The information we have gathered is, however, sufficiently concrete – and worrying – to encourage states at least to do all they can to get to the bottom of what took place in their countries and within certain of their institutions.

III. The concept: the development of the "High-Value Detainee" (HVD) Programme operated by the Central Intelligence Agency (CIA)

51. For the sake of clarity reference should be made to the CIA's covert programme using the correct terminology: among well-informed quarters, the programme is known as the "High-Value Detainee" programme, or simply the "HVD Programme".

52. The HVD programme has formed a very specific, narrow and unique strand of the United States' counter-terrorist operations in the period since 11 September 2001. Indeed, one reason why it has been so successfully covered up is that one can easily lose sight of this programme among the sizeable and still growing tally of people detained in the course of the "war on terror".

53. There have been scores of sites in which thousands of prisoners have been held for varying periods of time either by one or more agencies of the US Government, or on its behalf by foreign allies.

54. Among the most highly-populated and well-known of these detention sites – and indeed, hosts to CIA detainees at one time or another – have been the various internment "Camps" on the US Naval Base at Guantanamo Bay, the Bagram Airfield in Kabul, Afghanistan and the Abu Ghraib facility in Baghdad, Iraq. The public has been able to get some sort of picture of these sites, not from transparent information provided by the competent authorities but rather from leaks, statements from former inmates and secretly filmed images of detainee abuse.

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55. Even in this context, the HVD programme is different. One senior source in the CIA Counterterrorism Centre told us: "If a guy is captured on the battlefield and sent to [Guantanamo], that's got nothing to do with it. But I think there is a tendency in the media, in Europe and in America, to blend together what the FBI is doing, what the military is doing and what the CIA is doing – to attribute it all to the same programme. And frankly, you can't do that. The HVD programme is a very structured, very rigorous programme."

56. In my understanding, the narrative of the HVD programme has played out largely over a five-year period, from September 2001 to September 2006. CIA insiders told us that there was widespread surprise that it operated and remained secret quite as long as it did. From 2004 onwards, the President was being strongly advised to place a time limit on the programme because it was regarded as having been somewhat improvisational in its nature and therefore could not be sustained: "every period in history has its bookends".

57. The conception of the HVD programme can be traced to the days immediately after 11 September 2001, when senior CIA officials (including CIA Director George Tenet) worked with the political principals of the Bush Administration (including President Bush himself) to conceive, debate and formulate strategies to "give some extra potency" to America's "frontline officials" in combating and countering the global terrorist threat.

58. On 17 September 2001 President Bush signed a classified Presidential Finding[13] as a means of granting the CIA important new competences relating to its covert actions: new choices it could make and new ways it could respond if confronted with Al-Qaeda targets in the field. On the day this document was signed – the Sunday after the 11 September attacks – senior members of the CIA's Counter-Terrorism Center (CTC) and selected foreign counterparts were made familiar with its contents in a meeting in Washington, DC.[14]

59. Our team has spoken with several American officials who have seen the text of the Presidential Finding and participated in the operations that put it into action. Two particularly striking observations have emerged from these discussions. First, by putting "*a lot of stock in Special Activities*"[15] the Finding "*redefined the role of the Agency*", even in the eyes of some of its own, more conservative senior officials. Second, the "*really broad, not specific*" scope of the covert actions authorised in the Finding meant that the CIA was instantly granted enough room for manoeuvre to design a secret detentions programme overseas[16].

[13] The US Government finally concedes the existence of this classified Presidential Finding in response to a Freedom of Information Act (FoIA) litigation brought by the American Civil Liberties Union (ACLU) in 2006. Nonetheless, the precise scope and contents of the Finding remain unknown and, according to Congressional staffers, even senior members of the relevant House and Senate Select Committees have not been allowed to access it. See ACLU Press Release, "CIA Finally Acknowledges Existence of Presidential Order on Detention Facilities Abroad", 14.11.2006, available at http://www.aclu.org/safefree/torture/27382prs20061114.html; see also US Senator Patrick Leahy, "Comments of Senator Patrick Leahy (D-Vt.), Incoming Chairman, Senate Judiciary Committee, on Department of Justice's Response to Request for Documents relating to Bush Administration's Interrogation Policies", 2.01.2007, available at http://leahy.senate.gov/press/200701/010207.html.

[14] The former Chief of CIA Clandestine Operations in Europe, Tyler Drumheller, recounts the meeting of 17.09.2001 in his memoirs: "*Cofer [Black, then Chief of the CTC] presented a new Presidential authorisation that broadened our options for dealing with terrorist targets – one of the few times such a thing had happened since the CIA was officially banned from carrying out assassinations in 1976. It was clear that the Administration saw this as a war that would largely be fought by intelligence assets. This required a new way of operating*". See Tyler Drumheller, *On the Brink: An Insider's Account of How the White House Compromised American Intelligence*, Carroll & Graf, New York, 2006 (hereinafter "Tyler Drumheller, On the Brink"), at p. 35

[15] The Special Activities Division is akin to a paramilitary wing of the CIA; the kinds of "activities" referred to here include renditions and, in exceptional circumstances, assassinations of suspected Al-Qaeda members.

[16] I am certain that our HVD programme has its general origins in the 17.09.2001 Finding, because our sources were unanimous on the question of the latitude this document afforded to the CIA. However we were also told separately of the existence of further classified documents (thought to have been signed in 2002) that actually use the term "black sites" in relation to specific facilities.

60. One senior former CTC official said the broad scope and enhanced paramilitary powers for the CIA were negotiated into the terms of the Finding with "*revenge for the 9/11 attacks*" in mind. Another former CTC official with direct responsibility for geographical areas in which Al Qaeda was operating told us: "This Administration needed some public successes, so they put a lot more pressure on us to find these people, and they decided to hold these people themselves. I think those are the two major changes post-9/11."

61. Thus, there had emerged a category of terrorist suspects whom the CIA considered of high value and to whose capture, detention, transfer and interrogation it would ultimately dedicate an entire covert programme. The men in this category had mostly been picked out already as "High-Value Targets", or HVTs,[17] and once in the custody of the CIA they would become "High-Value Detainees", or HVDs.[18]

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62. The profile of the HVTs was that of orchestrators, planners, leading operatives and providers of logistics for some of the most devastating terrorist plots attributed to Al-Qaeda and to its associates. In our discussions, current and former CIA officials have been keen to emphasise, even in hindsight, that their targets span only a very limited range. One asserted: "If you look down the list of the people we've picked up since 9/11, the Agency has maintained a very high level of pertinence in terms of our targets." Another confirmed: "we didn't want the insurgents; we wanted the leadership."

63. CIA dossiers compiled on these men were comprehensive and constantly being updated. As my representative was told by Michael Scheuer, former Chief of the Bin Laden Unit: "the one problem we never had was lack of information."[19] Intelligence on the HVTs was replete with references to their involvement in the 9/11 attacks and the evolution of its feeder cells, or in other major events in the global escalation of terrorism, such as the dual attack on US Embassies in East Africa, the assault on the US Navy ship USS Cole, or the Bali nightclub bombings.

64. Just as the CIA rendition programme - instigated in the 1990s and escalated in the post-9/11 years - maintained its "*safety net*" of having obtained legal approval for every operation it launched,[20] the CIA's post-9/11 HVD programme was designed and vetted in consultation with various lawyers in the Justice Department, the CIA and in the Presidential Administration. All three of these sets of lawyers, as our sources confirmed, have approved so-called "Kill, Capture or Detain" orders, or "K-C-D orders", for high-value targets with whom the CIA came into contact. B5

65. The template for the High-Value Detainee programme was not drawn out of the KCD's Detain (or "D") category, since this was said to be a more general responsibility (shared with the military and local counterparts) for those persons picked up in the course of counter-terrorist activities about whose intelligence value the CIA unit on the ground was less certain:

> *"D was like our default option: Detain. Like if we pick up some guy in a raid where we also got one of the HVTs, like [Ramzi] bin Al-Shibh, and maybe we've got nothing on this guy, but obviously we're still gonna hold him."*

[17] Public citations of the acronym "HVT" have become more common in the course of the "war on terror". It is commonly used, for example, among members of the US Armed Forces, particularly those who have been deployed to track down prominent Baathists and insurgents in Iraq, such as Uday and Qu'say Hussein, or Abu Musab al-Zarqawi. See Defense Technical Information Center, "Loss of High-Value Targets" available at http://www.dtic.mil/doctrine/jel/doddict/data/h/02487.html.

[18] The acronym "HVD" has also now been adopted in public citations used by the Office of the Director of National Intelligence (DNI) and the Department of Defense (DoD). See, for example, Office of the Director of National Intelligence (DNI), "Summary of the High-Value Terrorist Detainee Program", 06.09.2006, available at: http://www.defenselink.mil/pdf/thehighvaluedetaineeprogram2.pdf.

[19] Michael Scheuer, former Chief of the Bin Laden Unit in the CIA's Counterterrorism Center, interview carried out by the Rapporteur's representative in Washington, DC, May 2006. Scheuer told us: "We had built up dossiers on all the important people in Al Qaeda within six months after we started the rendition programme. So it was just a matter of keeping these files updated. The approval of the senior levels of the Government and the lawyers' approval, if you pushed them, could be gotten very quickly because everything was ready."

[20] For my comprehensive account of "The evolution of the rendition programme", including its legal and operational considerations, see The Marty Report 2006, supra note 6.

66. According to our sources, the tailor-made HVD programme actually grew out of the KCD's Capture (or "C") category, which comprised targets whom the CIA set out expressly to capture, sometimes offering multi-million dollar US Government rewards for decisive tip-offs. The design of a special HVD programme helped to address a key "what next?" question, as one well-placed source explained:

> *"We knew that we would have some successes when we went out to get these guys, with the resources we were throwing at it and the support of our friends in the Pakistani Services[21]. So the real question was "what are we gonna do with them when we got them?"*

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67. The CIA ruled out the prospect of having its HVTs handed over to or shared with the US military or the FBI, let alone foreign services – "these high-value targets are not moved between agencies or nations" – believing that the security and integrity of the resultant interrogations, in particular, could not be guaranteed. On the same grounds Guantanamo Bay "offered nothing" akin to the secrecy and isolation that the CIA demanded: "Guantanamo was a real mess. The interrogators there were FBI and military... [who] thought they knew what they were looking for, but they didn't know who they were talking to. The United States had a laboratory at Guantanamo, for the first time, to understand the insurgent arm of Al Qaeda... [but] we screwed it up!"

68. Hence the concept of "black sites", a handful of facilities of limited size and capacity in different parts of the world, where the CIA exclusively would be the jailer.

iv. The evolution of specific "black sites" in the HVD programme

69. A significant breakthrough, which became the trigger for the operations of the HVD programme, was the CIA's capture of Abu Zubaydah in March 2002. Mr Zubaydah's peculiar importance from the US Government's perspective has been well documented – not least in President Bush's speech of 6 September 2006 – in which he was mentioned 12 times, including to acknowledge that an "*alternative set of procedures*"[22] was introduced specifically for his interrogation. In the ensuing period of approximately two-and-a-half years, information garnered from HVD interrogations using these procedures is said to have proved crucial in combating Al-Qaeda's worldwide terrorist operations.[23]

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70. There are two more specific locations to be considered as "black sites" and about which we have received information sufficiently serious to demand further investigation; we are however not in a position to carry out adequate analysis in order to reach definitive conclusions in this report. First we have received concurring confirmations that United States agencies have used the island territory of Diego Garcia, which is the international legal responsibility of the United Kingdom, in the "processing" of high-value detainees. It is true that the UK Government has readily accepted "assurances"[24] from US authorities to the contrary, without ever independently or transparently inquiring into the allegations itself, or accounting to the public in a sufficiently thorough manner. Second we have been told that Thailand hosted the first CIA "black site," and that Abu Zubaydah was held there after his capture in 2002. CIA sources indicated to us that Thailand was used because of the ready availability of the network of local knowledge and bilateral relationships that dated back to the Vietnam War.[25] In line

[21] The phrase used here is understood to be a reference to the Inter Services Intelligence Agency, or ISI, which is Pakistan's military intelligence branch and is renowned for its close co-operation with the CIA.
[22] This phrase is understood to be a reference to the regime of CIA "enhanced interrogation techniques", which were subsequently used to interrogate several other HVDs. For a description of these techniques and the (operational and legal) implications of resorting to them, please see section V. and VII. later in this report.
[23] As President Bush has presented it, when all the leads yielded from these interrogations are taken together ("corroborated by intelligence ... that helped us to connect the dots"), then the cumulative product has "played a role in the capture or questioning of nearly every senior Al-Qaeda member or associate detained by the US and its allies since this programme began". See also Office of the Director of National Intelligence (DNI), "Summary of the High-Value Terrorist Detainee Program", 06.09.2006, available at http://www.defenselink.mil/pdf/thehighvaluedetaineeprogram2.pdf.
[24] See, for example, United Kingdom Parliament, Publications and Records: "Written Answers for 21.06.2004", in *House of Commons Hansard*, point 13, column 1222W, Questions to the Rt. Hon. Jack Straw, UK Foreign Secretary, available at http://www.publications.parliament.uk/pa/cm200304/cmhansrd/vo040621/text/40621w13.htm#40621w13.html_wqn8. Mr. Straw said: "The United States authorities have repeatedly assured us that no detainees have at any time passed in transit through Diego Garcia or its territorial waters or have disembarked there and that the allegations to that effect are totally without foundation. The Government are satisfied that their assurances are correct.
[25] One CIA source told us "In Thailand, it was a case of 'you stick with what you know';" however, since the allegations pertaining to Thailand were not the direct focus of our inquiry, we did not elaborate further on these references in our discussions. The specific location of the "black site" in Thailand has been publicly alleged to be a facility in Udon Thani, near to the Udon Royal Thai Air Force Base in the north-east of the country. This base does have long-standing connections to

with the approach of most US partner countries, the Thai Government has denied these allegations outright.[26]

71. The HVD programme has, to a certain extent, grown out of an assertion of *independence* on the part of the CIA in the exercise of "exclusive custody" over its high-value detainees for as long as it continues to question them. However, as my findings in the following sections demonstrate, the CIA's clandestine operations in Europe – including its transfers and secret detentions of HVDs - were sustained and kept secret only through their operational *dependence* on alliances and partnerships in what is more traditionally the military sphere.

II. Secret detentions in Council of Europe member states

i. The framework

a. Securing CIA clandestine operations overseas on the platform of the North Atlantic Treaty Organisation (NATO)

72. By enacting an extraordinary authorisation for CIA covert action through a Presidential Finding within national law, the Bush Administration furnished the Agency with the first half of the operational framework it required to spearhead the United States' "global war on terror."[27] To recap, the key elements of this authorisation were permissions that were as broad as possible, and protections (from interference and oversight) that were as robust as possible.

73. The second half of the equation was then to identify the *means* by which to integrate the key elements of US national policy into an international, intergovernmental approach.

74. According to our sources, the CIA simply could not embark upon sensitive covert action to dismantle terrorist networks and kill, capture or detain their members overseas without the express knowledge and approval of key US allies – particularly European allies: "we wouldn't have even dreamed of it."[28] On the contrary, the CIA depended on the US Government to secure equally broad permissions and equally robust protections from its foreign allies and their respective intelligence agencies as the ones that had been granted at home.

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American defence and intelligence activities overseas: during the Vietnam War it served as both a deployment base for the US Air Force and the Asian headquarters of the CIA-linked aviation enterprise, Air America.
[26] See, for example, *The Bangkok Post*, "Thaksin denies Thailand had 'CIA secret prison'," 5.11.2005, available at http://www.bangkokpost.com/breaking_news/breakingnews.php?id=59604.
[27] At this point I shall leave aside my discomfort with the phrase "war on terror" as a characterisation of the broad spectrum of counterterrorist policies pursued by the United States in recent years – it was the phrase accepted in all quarters in the immediate post-9/11 period. In this regard I agree with Anderson and Massimino, the authors of an excellent policy study recently released in the US: "The very idea of a 'global war on terror' is today seen as the policy of a particular presidential administration in a way that it was not immediately following September 11"; see Kenneth Anderson and Elisa Massimino, "The Cost of Confusion: Resolving Ambiguities in Detainee Treatment", part of the series entitled *Bridging the Foreign Policy Divide*, The Stanley Foundation, March 2007; hereinafter "Anderson and Massimino, "Resolving Ambiguities in Detainee Treatment". My conclusion that President Bush put the CIA at the forefront of his "war machinery" is corroborated by numerous CIA insiders; see, for example, Tyler Drumheller, *On the Brink*, supra note 19, at p. 35: "It was clear that the administration saw this as a war that would largely be fought by intelligence assets". See also, Michael Scheuer, interview with the Rapporteur's representative, supra note 21: "The Agency felt the brunt of the executive branch's desire to show the American people victories."
[28] Our sources have continually emphasised to us how keenly the United States has sought to observe the "sovereignty" of its allies, particularly [illegible] in Europe. From an intelligence perspective, the notion of "unilateral actions on European soil" was [illegible] characterised to us as "counter-productive" and "a surefire way of destroying the trust". More importantly, from a political perspective, the art of "coalition-building" is just as important for covert action as for large-scale military operations. It affords the US Government the opportunity, as one official described it to us, "to cover our backs by saying 'hey, we're not the only ones'". In this regard, it is relevant to consider the policy statements made by members of the Bush administration to defend its detention and rendition practices after the fact: see, in particular, Secretary Condoleezza Rice, US Secretary of State, "Remarks Upon Her Departure for Europe", Andrews Air Force Base, 5 December 2005: "The intelligence so gathered has stopped terrorist attacks and saved innocent lives – in Europe as well as in the United States and other countries. The United States has fully respected the sovereignty of other countries that co-operate in these matters."

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75. The need for unprecedented permissions, according to our sources, arose directly from the CIA's resolve to lay greater emphasis on the paramilitary activities of its Counterterrorism Center in the pursuit of high-value targets, or HVTs. The US Government therefore had to seek means of forging intergovernmental partnerships with well-developed military components, rather than simply relying upon the existing liaison networks through which CIA agents had been working for decades.

76. One former senior CIA official told us that administration officials approached multilateral negotiations "like they wanted to raise [the CIA]'s status up to a kind of super military-civilian Agency". Specifically the US Government set out to achieve permissions "from as many allied countries as possible" that would allow CIA agents to collaborate directly with foreign military officials, operate "on a no-questions-asked basis" at military installations, and travel free from inspection in military or civilian vehicles and aircraft.

77. In relation to the last point, as I discussed in my report last year,[29] the lines between civilian and military classifications in the aviation world were about to become incredibly blurred. Conventional legal understandings of civilian and state flights[30] were about to be fundamentally challenged, or at least the latitude in those definitions exploited to its maximum potential.

78. The US Government's post-9/11 detainee transfer operations would frequently make use of practices that were previously considered "anomalies,"[31] such as: civilian aircraft landing on state duty at military airfields; military cargo planes registered under civilian operators; and civilian agents and contractors travelling on military travel orders. The CIA's expanding and evolving "rendition" programme, which would ultimately also be used for the transportation of High-Value Detainees, required cover that would encompass all of these anomalies and more.

79. In terms of protections, the US Government insisted on the most stringent levels of physical security for its personnel, as well as secrecy and security of information during the operations the CIA would carry out in other countries.

80. Reflecting on what our sources have described in this regard, I consider that the stated US policy has, in fact, on the pretext of guaranteeing security, intentionally created a framework enabling it to evade all accountability. We have been told that the US Government sought a means of "insulating" the CIA's activities (and those of its partner intelligence agencies) from conventional democratic controls in the foreign countries it operated in, not to mention from what it saw as any "unsavoury disputes over jurisdictional issues."

[29] For my discussion of means of transporting detainees between points on the "global spider's web", see The Marty Report 2006, *supra* note 6, at sections 2.2 to 2.4, pages 15 to 19.

[30] For an authoritative analysis of the applicable general principles of aviation law, see the Opinion on the International Legal Obligations of CoE Member States in respect of Secret Detention Facilities and Inter-state Transport of Prisoners, adopted by the Venice Commission at its 66th Plenary Session, 17.03.2006; Opinion No. 363/2006, CDL-AD(2006)009, available at http://www.venice.coe.int/docs/2006/CDL-AD(2006)009-e.asp (hereinafter "Venice Commission Opinion, 17.03.2006"), at §§ 99-104

[31] An aviation expert whom we consulted confidentially used the phrase "anomalies" to describe the practices I refer to here. There are numerous examples of each of these "anomalies" in the comprehensive database of aircraft movements I have compiled since the outset of my inquiry (database held confidentially by the Rapporteur). In this regard I am especially grateful to Eurocontrol, the European Organisation for the Safety of Air Navigation, for having provided me with extensive records in various formats in response to my requests for information. I have been able to supplement and verify Eurocontrol records with information from multiple sources, including from the US Federal Aviation Authority (FAA) and state institutions in different CoE member States, such as transport ministries, aviation authorities, airport operators and state airlines. Hereinafter my database of aircraft movements is referred to simply as "The Marty Database".

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81. Yet in my view, checks and balances through national parliamentary and judicial oversight, as well as accepted international laws governing territorial sovereignty, are the very foundations upon which our systems of democratic accountability are built. In times of crisis, such as the immediate aftermath of the 9/11 attacks, these foundations must be strengthened by demonstrations of collective resolve, not weakened by acts of unilateral brinkmanship.

82. It is now clear to me that as they went to their international allies with their proposals, the United States insisted – non-officially but explicitly – upon a clear set of unilateral prerogatives: only American officials would choose exactly who they wanted to work with; only US policies would define exactly the terms of the relationship; and only US interpretations of the applicable law (including whether or not it applied) would be held to bind its actions overseas.

83. Based upon my investigations, confirmed by multiple sources in the governmental and intelligence sectors of several countries, I consider that I can assert that the means to cater to the CIA's key operational needs on a multilateral level were developed under the framework of the North Atlantic Treaty Organisation (NATO).

b. Invocation of Article V of the North Atlantic Treaty

84. It should be recalled that the United States turned to the international community at an unprecedented moment in history. As a prominent US Congressman remarked recently, "In the wake of the horrific attack on the United States on September 11th [2001], we were moved by the extraordinary support and the outpouring of sympathy from across the globe."[32] These sentiments manifested themselves in a unique and almost universally shared conviction that the United States should be granted strong support for its international counter-terrorist efforts, including for the use of military force.

85. This conviction was most pronounced within the NATO Alliance. On 12 September 2001, NATO thereby invoked the principle of collective defence according to Article 5 of the North Atlantic Treaty,[33] and this for the first time in its 52-year existence. Initially, the invocation was considered provisional because it began with a conditional clause:

> *"If it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5 of the Washington Treaty."*[34]

86. During the weeks that followed, several of the most senior officials in the Bush Administration delivered "a series of classified briefings for the NATO members presenting evidence that Al Qaeda had planned and executed the attacks"[35] and outlining their intended response. There is evidence in the following excerpt from an account by a then NATO Assistant Secretary-General that some of the United States' "unilateral prerogatives" described by our sources were articulated in quite explicit terms during these briefings:

> *"I was present in the [North Atlantic] Council two weeks after NATO invoked Article 5 when then US Deputy Secretary of Defence Paul Wolfowitz set out his post-9/11 doctrine to the effect that the mission determines the coalition. This was, in my opinion, a fundamental*

[32] Representative William Delahunt (D-Ma), Chairman of the International Organisations, Human Rights and Oversight Sub-Committee of the House Foreign Affairs Committee, opening remarks on the subject "Extraordinary Rendition in US Counterterrorism Policy: The Impact on Transatlantic Relations", 17.04.2007. Mr Delahunt also said: "I shall never forget the headline from the French newspaper *Le Monde* that proclaimed, 'Today, we are all Americans.' Sadly, that support has eroded dramatically... World opinion has turned against the United States in recent years [and].. this reality, this trend of opinion against the United States has profound negative consequences for our national interests."

[33] Article 5 of the North Atlantic Treaty provides as follows: *"The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered as attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security."*

[34] See NATO Press Release (2001) 124, "Statement by the North Atlantic Council", 12.09.2001.

[35] See Nora Bensahel, *Counterterror Coalitions: Co-operation with Europe, NATO and the European Union*, The Rand Corporation, USA, 2003 (hereinafter "Bensahel, *Counterterror Coalitions*"), at pp. 6-7. According to Bensahel, the US policy-makers who briefed NATO included Deputy Secretary of State Richard Armitage, Deputy Secretary of Defence, Paul Wolfowitz and State Department Co-ordinator for Counterterrorism, Frank Taylor.

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misjudgement about the nature of the Alliance that devalued the importance of strategic solidarity."[36]

87. The US Administration's briefings had their desired effect of lifting the conditional clause in the North Atlantic Council's original statement. On 2 October 2001, the NATO Allies declared their unanimous assessment that the 9/11 attacks had been directed against the United States from abroad and that Article 5 was therefore activated.[37]

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88. Collective measures in the context of a military intervention in Afghanistan were widely anticipated – indeed, as one study noted, "many NATO members hoped that invoking Article 5 would lead the United States to conduct any military response against Al Qaeda under the NATO flag, or at least co-ordinate its actions with the integrated military structure and political institutions."[38]

89. However, the expected mobilisation of NATO forces for a multilateral action in Afghanistan never materialised. In fact, NATO support in the conventional military sense was neither an automatic consequence in the invocation of Article 5[39] nor, as our sources have confirmed, what the US Government was looking for.[40] It is precisely upon this unexpected dynamic that my finding regarding the development of CIA clandestine operations under the NATO framework hinges.

90. **There was a critical, almost paradoxical policy choice in the US Government's stance towards the NATO alliance in early October 2001. The invocation of Article 5 could have been developed[41] as a basis upon which to conduct a military campaign of a conventional nature, deploying Army, Navy and Air Force troops in a joint NATO operation. Instead it became a platform from which the United States obtained the essential permissions and protections it required to launch CIA covert action in the "war on terror".**

c. NATO authorisations for US operations in the "war on terror"

91. The key date in terms of the NATO framework is **4 October 2001**, when the NATO Allies met in a session of the North Atlantic Council to consider a set of concrete proposals from the United States. In a press statement after the session,[42] NATO Secretary-General Lord Robertson announced that the Allies had "agreed today – at the request of the United States – to take eight measures, individually and collectively, to expand the options available in the campaign against terrorism."[43] The eight specific measures agreed to[44] were as follows:

[36] See Edgar Buckley, former NATO Assistant Secretary-General for Defence Planning and Operations (from 1999 to 2003), "Invoking Article 5", in *NATO Review*, Summer 2006, available at http://www.nato.int/docu/review/2006/issue2/english/art2.html (hereinafter "Buckley, "Invoking Article 5"").
[37] See NATO Press Release of 02.10.2001, "Statement by NATO Secretary-General Lord Robertson".
[38] See Bensahel, *Counterterror Coalitions*, supra note 37, at p. 7.
[39] Article 5 refers to "such action as [each Party] deems necessary" and does not limit this action to the use of military force. It should be noted that France and Germany emphasised the fact that the obligation to assist under Article 5 did not automatically incur a duty to take part in US-led military action. In this regard, see Tom Lansford, *All for One: Terrorism, NATO and the United States*, Ashgate, UK, 2003, at p. 86; and Martin Reichard, *The EU-NATO Relationship: A Legal and Political Perspective*, 2006, at p. 190.
[40] See also Philip Gordon, "NATO After 11 September", in *Survival*, Vol. 43, No. 4, Winter 2001 – 2002, at p. 92. A senior US official stated: "I think it's safe to say that we won't be asking SACEUR [the NATO Supreme Allied Commander for Europe] to put together a battle plan for Afghanistan." Further, see Nicholas Fiorenza, "Alliance Solidarity", *Armed Forces Journal International*, December 2001, at p. 22. A military official asked rhetorically: "If you were the US, would you want 18 other nations watering down your military planning". Both cited in Bensahel, *Counterterror Coalitions*, supra note 37, at pp. 7 and 18.
[41] For a perspective on how the invocation of Article 5 did not unfold entirely as NATO had expected, see, for example, Buckley, "Invoking Article 5", supra note 36: "In the intervening years, I have heard frequent criticism of the decision to invoke Article 5. I have, for example, heard people say that we were unwise to commit ourselves to a course of action which was not fully implemented and which turned out to be unwanted by the United States... I share the frustration of those who believe that the United States could have done more to engage the Alliance in its efforts against the Taliban and Al Qaeda."
[42] See NATO, "Statement to the Press by NATO Secretary General, Lord Robertson, on the North Atlantic Council Decision on Implementation of Article 5 of the Washington Treaty following the 11 September Attacks against the United States", Brussels, 04.10.2001, available at http://www.nato.int/docu/speech/2001/s011004b.htm (hereinafter referred to as "Statement to the Press by NATO Secretary General, Lord Robertson, 4.10.2001").
[43] *Ibidem*. Note the similarity in the language of "options" used to describe the intergovernmental NATO authorisation and likewise (ref. Tyler Drumheller, supra note 16) the US domestic covert action authority in the Presidential Finding of 17.09.2001: "broadened our options for dealing with terrorist targets."
[44] Some of the descriptions of the measures have been shortened or paraphrased here in order to present them more simply. For the original language in which they were presented to the public, see the Statement to the Press by NATO Secretary General, Lord Robertson, 04.10.2001, supra note 44.

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- Enhance intelligence-sharing and co-operation, both bilaterally and in the appropriate NATO bodies, relating to the threats posed by terrorism and the actions to be taken against it
- Assist states subject to increased terrorist threats as a result of their support for the campaign against terrorism
- Provide increased security for US and other allied facilities on NATO territory
- Backfill selected Allied assets in NATO's area of responsibility that are redeployed in support of counterterrorism operations
- Provide blanket overflight clearances for the United States' and other Allies' aircraft for military flights related to operations against terrorism
- Provide access to ports and airfields on NATO territory, including for refuelling, for United States and other Allies for operations against terrorism
- Deploy elements of the NATO Standing Naval Forces to the eastern Mediterranean, if called upon
- Deploy elements of NATO Airborne Early Warning Force to support operations against terrorism, if called upon.

92. The first criterion on which these measures were extraordinary was in the nature of their conception. According to a former senior NATO official, "In contrast to many other international organisations, responsibility for drafting documents and resolutions in NATO lies with the International Staff."[45] Yet as Lord Robertson reiterated in his statement, "these measures were requested by the United States following the determination that the 11 September attack was directed from abroad."[46] Indeed, as our American sources told us, even the exact language in which the actual measures were formulated and agreed upon was conceived, drafted, re-drafted and put forward unilaterally by the United States.

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93. Second and most significant, these measures do not constitute an agreement to undertake collective self-defence.[47] In my analysis these measures more closely comprise the very permissions and protections the United States had sought for itself as it embarked on its own military, paramilitary and intelligence-led counterterrorism operations.[48] Just as President Bush had done on 17 September 2001, the NATO Allies, on 4 October 2001, afforded the CIA a mandate to pursue its "war on terror", without a published text.

94. Council of Europe officials attempted to obtain a copy of the "agreement" of 4 October 2001 from NATO Legal Services on several occasions.[49] In a response dated 6 April 2006,[50] NATO's Legal Advisor, Mr Baldwin De Vidts, submitted that the "agreement" in question was actually more properly characterised as a set of "decisions taken by the North Atlantic Council on that date"; he explained:

> *"It is to be noted that your request does not relate to a formal document signed by the member States but to an internal decision noted in a corresponding decision sheet drawn up by the International Secretariat to reflect the decisions as taken by the Council on that date."*

[45] See Buckley, "Invoking Article 5", supra note 36.
[46] See Statement to the Press by NATO Secretary General, Lord Robertson, 04.10.2001, supra note 44.
[47] I take the view that only the last two measures could be considered as responses in the category of "classic" collective self-defence. In recognising this point, one observer has argued that a broad approach to military and non-military measures was consistent with the US approach to counterterrorism: see Reichard, supra note 41, at p. 189. I would add, however, these measures are somewhat ceremonial in character; both of them begin with a phrase "that the Alliance is ready to deploy", and the first of them states that the purpose of such a deployment would be "to provide a NATO presence and demonstrate resolve." The "classic" self-defence provisions therefore stop short of any genuine commitment to military action. The real practical substance of these measures is to be found in the other clauses.
[48] In its published material, NATO makes clear that the period after the invocation of Article 5 accommodates a range of individual and collective policy choices: "Any collective action by NATO will be decided by the North Atlantic Council. The United States can also carry out independent actions, consistent with its rights and obligations under the UN charter. Allies can provide any form of assistance they deem necessary to respond to the situation." See NATO, *What is Article 5?*, available at http://www.nato.int/terrorism/five.htm.
[49] I refer here to various individual items of correspondence sent to Mr Baldwin De Vidts, NATO Legal Advisor, by both Mr G. Buquicchio, Secretary of the European Commission for Democracy through Law (Venice Commission), and Mr A. Drzemczewski, Head of Secretariat of the PACE Committee on Legal Affairs and Human Rights (AS/Jur). Copies of all correspondence on file with the Rapporteur.
[50] Letter to Mr G. Buquicchio, Secretary of the Venice Commission, from Mr Baldwin De Vidts, NATO Legal Advisor, Reference CJ(2006)0230, dated 06.04.2006. Regrettably this response came three weeks after the issue of the Venice Commission's opinion on the matter, dated 17.03.2006. See the reference to this correspondence in the Opinion on the International Legal Obligations of CoE Member States in respect of Secret Detention Facilities and Inter-state Transport of Prisoners, adopted by the Venice Commission at its 66th Plenary Session, 17.03.2006; Opinion No. 363/2005, CDL-AD(2006)009 (hereinafter "Venice Commission Opinion, 17.03.2006"), at § 4.

95. In the same letter, Mr De Vidts stated that "in principle, such documents are not made public, which is certainly the case if they are classified."[51] In a subsequent follow-up letter sent on my behalf, I indicated to NATO Legal Services, in accordance with my authorisation as AS/Jur Rapporteur, that I would be prepared to treat the document in a confidential manner.[52] However, Mr De Vidts replied in the following terms:

> *"I can only but confirm that the decision sheet of the North Atlantic Council dated 4 October 2001 is a classified document. I have to state that in order to have access to NATO classified information, such person should have an appropriate security clearance."*[53]

96. Notwithstanding this general rule, which I understand to be a reflection of broader issues around transparency within NATO,[54] there was a further noteworthy feature of the 4 October 2001 measures to emerge from our correspondence with NATO Legal Services. Qualifying his earlier point, Mr De Vidts stated:

> *"However, with regard to certain decisions separate communications to the public in general are made. This has also been the case for <u>some of the decisions</u> taken on 4 October 2001 by the North Atlantic Council"* (emphasis added)

97. The clear indication here is that the public record[55] is not a complete reflection of the measures agreed by the NATO Allies and the considerations underpinning them. It is my conclusion, again confirmed by my American sources, that there were additional components to the NATO authorisation of 4 October 2001 that have remained secret.

98. In the course of my inquiry, I have made repeated requests for information regarding the full scope of the NATO authorisation, specific elements of its practical application, and whether its provisions remain in force to the present day. Regrettably, NATO itself has been largely unresponsive to my requests.[56]

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[51] Letter to Mr G. Buquicchio, Secretary of the Venice Commission, dated 06.04.2006, *ibidem*.

[52] Letter to Mr De Vidts from Mr Drzemczewski, Head of the Secretariat, PACE Committee on Legal Affairs and Human Rights (AS/Jur), dated 24.03.2006.

[53] Letter in reply to Mr Drzemczewski's letter of 24.03.2006 from Mr De Vidts, NATO Legal Adviser, Reference CJ(2006)0330, dated 13.04.2006. It should be noted that NATO is accustomed to rejecting requests for "NATO information". Even unclassified information remains for the most part inaccessible, based on the following principle: "NATO unclassified information… can only be used <u>for official purposes</u>. Only individuals, bodies or organisations that require it for official NATO purposes may have access to it… NATO information marked in this manner is subject to release via agreement from its originators and subject to recognised storage procedures for its protection" – see letter from Wayne Rychak, Director, NATO Office of Security, to Jacob Visscher, General Secretariat of the Council of the European Union 6.02.2002 (emphasis in original); cited in Alasdair Roberts, "Entangling Alliances: NATO's Security of Information Policy and the Entrenchment of State Secrecy", Cornell International Law Journal, 36 2 (November 2003): 329 – 360, at page 9 in the text.

[54] For insight into the NATO secrecy and security of information regime and its negative impact on transparency in general, I have found the work of the Canadian specialist on transparency issues, Professor Alasdair Roberts, very informative. Specific articles can be found at <u>www.aroberts.us/research.html</u>.

[55] The only public record of the 4.10.2001 meeting of the North Atlantic Council is the Statement to the Press by NATO Secretary General, Lord Robertson, 4.10.2001, supra note 4. Mr De Vidts attached a print-out of this statement from the NATO website to his letter of 13.04.2006.

[56] Regrettably, NATO itself has been largely unresponsive to our repeated requests for information regarding the full scope of the authorisation, elements of its practical application, and whether its provisions remain in force to the present day. We have sent five separate items of correspondence to Mr De Vidts: letters from Mr Drzemczewski, Head of the Secretariat, PACE Committee on Legal Affairs and Human Rights (AS/Jur) dated 24.03.2006 and 28.04.2006; e-mails of 27.09.2006 and 09.11.2006; and fax of 06.11.2006, receipt of which was confirmed in a telephone conversation with Mr De Vidts' office on 05.12.2006. We have thus far received only a single, incomplete reply: letter from Mr De Vidts, dated 13.04.2006; the reply was incomplete because Mr De Vidts said that one of our questions "is under consideration and at our earliest convenience I will contact you about these issues". On 27.03.2007 I wrote to Mr Jaap de Hoop Scheffer, Secretary-General of NATO, requesting clarification on the outstanding questions. I have yet to receive any response to my letter.

99. Nevertheless, my further analysis of the NATO framework has shown that the authorisations of 4 October 2001 were vital in paving the way for the United States to develop its most important partnerships in the context of the "war on terror". In particular, the CIA would exploit both the blanket overflight clearances and the access to airfields to carry out its clandestine operations through the airspace and on the territory of a broad range of foreign states.

100. The blanket overflight clearances granted in this regard were especially significant. In the NATO public statement, the clearances were said to apply to "*military flights related to operations against terrorism*" but, even without sight of the classified parts of the authorisation, this characterisation is misleadingly narrow.

101. "Military flights" is a term relating to the *function* of the flight, not the type of aircraft used. In international aviation law, the status of an aircraft is determined by the function it is performing at any given time[57] - and flights performing "military" functions would necessarily fall into the category of "state aircraft."[58]

102. "State aircraft" enjoy precisely the type of immunity from the jurisdiction of other states that the US Government sought to achieve for aircraft operating on behalf of the CIA: "*they cannot be boarded, searched or inspected by foreign authorities, including host State's authorities.*"[59] The conventional constraint on "state aircraft" is that they are usually "*not permitted to fly over or land in foreign sovereign territory otherwise than with express authorisation of the State concerned.*"[60] However, with "blanket overflight clearances" under the NATO framework this constraint could be conveniently circumvented.[61]

103. Similarly, the provision of access to airfields for operations against terrorism secured landing rights at military bases and dual military-civilian airfields for aircraft operating on behalf of the CIA under a NATO "cover".[62]

104. Accordingly there would be two prerequisites for CIA clandestine operations to fulfil in order to remain within the NATO framework. The first would be to ensure that the aircraft used in such operations were, in their function, designated as "military flights" or "state flights". The second would depend on the state whose airspace or territory was at issue having agreed to the terms of the "blanket" NATO authorisations of 4 October 2001.

105. It is therefore all the more pertinent to note that the range of countries who agreed to these authorisations in the context of the US "war on terror" extended well beyond the NATO member states, into a total of as many as 40 countries.[63] One year after the NATO authorisations, the United States Government declared: "*Our Allies have delivered on that [Article 5] obligation with concrete actions, both individually and collectively: all 18 NATO Allies*[64] *and the 9 NATO 'aspirants'*[65] *have*

[57] See the Venice Commission Opinion, 17.03.2006, supra note 62, at § 91.

[58] The Venice Commission notes that "as a *general rule, 'aircraft are recognised as state aircraft when they are under the control of the State and used exclusively by the State for state intended purposes'*," citing Diederiks-Verschoor, Introduction to air law, Kluwer, p. 30, § 12. "Military flights," as defined by the NATO Allies in the context of this authorisation, cannot be interpreted to be anything other than "for state intended purposes." See the Venice Commission Opinion, 17.03.2006, *ibidem*, at § 91.

[59] See the Venice Commission Opinion, 17.03.2006, *ibidem*, at § 93.

[60] Article 3(c) of the Chicago Convention on International Civil Aviation, 1944, as cited in the Venice Commission Opinion, 17.03.2006, *ibidem*, at § 93.

[61] For another in-depth analysis of the law applicable to civil and state aircraft, including the applicable permissions / immunities and selected references to NATO, see Center for Human Rights and Global Justice, *Enabling Torture: International Law Applicable to State Participation in the Unlawful Activities of Other States*, NYU School of Law, 2006, available at <u>http://www.chrgj.org</u>.

[62] See the reference in Lansford, supra note 41, at p. 112: this agreement "allowed for more streamlined planning and the formulation of missions, especially the transfer of assets from one theater to another." Further references to the terminology of "theaters" in the "war on terror" – specifically relating to the transfer of detainees – were used frequently in our discussions with sources concerning secret detentions in Romania.

[63] See Lansford, supra note 41, at p. 112: "when the American-led attacks began, some <u>40 nations</u> gave the coalition permission to use their airspace for operations."

[64] At the time of this statement, the United States' 18 NATO Allies were: Belgium, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and the United Kingdom. All of them except Canada were then and are now also member States of the Council of Europe.

[65] At the time of this statement, the 9 NATO "aspirants" (or candidates for accession) were: Albania, Bulgaria, Estonia, Latvia, Lithuania, Romania, Slovakia, Slovenia and "the former Yugoslav Republic of Macedonia". All of them were then and are now also member States of the Council of Europe.

provided blanket overflight rights, ports / bases access, refuelling assistance, and increased law-enforcement co-operation."[66]

d. The wider NATO system and the "war on terror"

106. Aside from the specific authorisations detailed above, the wider NATO system comprises further important elements that have been developed as part of the post-9/11 framework for CIA clandestine operations – including the High-Value Detainee Programme. I intend to examine these elements in the following section as they have been applied to specific countries with which the United States has agreed bilateral arrangements in the course of the "war on terror". For now it suffices to acknowledge the general NATO multilateral treaties or policies on which those arrangements are based.

107. First is the system of NATO "SOFAs" (Status of Forces Agreements), which define the legal status of one state's armed forces on the territory of another state. The general rules of such relationships are set out in the multilateral SOFA for all NATO members,[67] the provisions of which also apply to "aspirant" states through their participation in the "Partnership for Peace"[68].

108. A state does not abandon its sovereignty when it signs a SOFA; on the contrary, SOFAs usually reflect different sets of legal rights and responsibilities that accrue for both the sending state and the host state.[69] The majority of SOFAs are agreed on the bilateral level and are sometimes complemented by further, more finite defence agreements that cover foreign forces stationed at particular bases or facilities. Several CoE member states have acknowledged the applicability of SOFA-type agreements to their relationships with the United States in the context of the "war on terror."[70]

109. An additional relevant element of the wider NATO system is its secrecy and security-of-information regime. The NATO Security Policy[71] and its supporting Directive on the Security of Information[72] are among the most formidable barriers to disclosure of information that one might ever

[66] See US Department of State, "NATO: Coalition Contributions to the War on Terrorism", Fact Sheet of 31.10.2002, available at http://www.state.gov/r/pa/ei/fs/14627.htm. Indeed, within days of the authorisations, US Secretary of State Colin Powell made special mention of *"all the NATO nations making commitments under the Article 5 invocation to give us overflight rights and other things that have proven so helpful to our efforts."* See US Department of State, "Colin Powell Holds Media Availability with NATO Secretary General George Robertson, 10.10.2001, available at http://transcripts.cnn.com/TRANSCRIPTS/0110/10/se.16.html.

[67] See NATO Status of Forces Agreement (SOFA) of 19.06.1951, "Agreement between the Parties to the North Atlantic Treaty Regarding the Status of their Forces", available at http://www.nato.int/docu/basictxt/b510619a.htm.

[68] See NATO Partnership for Peace SOFA (PfP-SOFA) of 1995, "Agreement among the State Parties to the North Atlantic Treaty and the other States participating in the Partnership for Peace Regarding the Status of their Forces", available at http://www.nato.int/docu/basictxt/b950619a.htm. It is important to note that, since it came into force in 1995, this PfP-SOFA has entitled signatories to the Partnership for Peace (PfP) that are not yet members of NATO to nevertheless sign so-called "SOFA Supplementals" with NATO member States. Signatories to the PfP are available at http://www.nato.int/pfp/sig-date.htm.

[69] See the Venice Commission Opinion, 17.03.2006, *supra* note 52, at §§ 106 and 107. For a general overview, see also the EU Network of Independent Experts on Fundamental Rights, "The Human Rights Responsibilities of the EU Member States in the context of the CIA activities in Europe," 25.05.2006, available at: http://ec.europa.eu/justice_home/cfr_cdf/doc/avis/2006_3_en.pdf.

[70] In this regard, it should be noted that nine different CoE member States made reference to NATO, SOFAs or defence agreements with the United States in their replies to the Secretary General of the Council of Europe in the context of his enquiry under Article 52 ECHR. For copies of all member States' replies and the SG's report on his findings, SG/Inf(2006)5, see the Special File at http://www.coe.int/T/E/Com/Files/Events/2006-cia/. In particular, Germany, the Netherlands, Poland and Romania made reference to Article 7 of the NATO SOFA as a provision that determines their potential jurisdiction over foreign forces operating on their territories. Article 7 of the multilateral NATO SOFA provides: "The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences related to the security of that State, punishable by its law but not by the law of the sending State."

[71] NATO's comprehensive Security Policy was modified and updated through a Fundamental Review by the NATO Security Committee (NSC), which concluded in early 2002. The policy is now contained in two documents approved by the North Atlantic Council: C-M(2002)49, "Security within the North Atlantic Treaty Organisation (NATO)"; and C-M(2002)50, "Protection Measures for NATO Civil and Military Bodies, deployed NATO Forces and Installations (Assets) against Terrorist Threats". The first of these documents, C-M(2002)49, which entered into force on 17.06.2002, contains the applicable rules on classification, handling and protection of sensitive information, as well as rules on establishment of and access to NATO Security Areas, and rules relating to NATO personnel. C-M(2002)49 was released on 01.04.2006 by the Hungarian National Security Superintendence in response to a freedom of information request by the Hungarian Civil Liberties Union (HCLU); copy on file with the Rapporteur. C-M(2002)49 is hereinafter referred to as "NATO, Security within the North Atlantic Treaty Organisation, 17.06.2002".

[72] NATO Security Committee, "Directive on the Security of Information", Document AC/35-D/2002, Second Revision, issued 04.02.2005. AC/35-D/2002-REV2 was released in October 2006 by the Hungarian National Security Superintendence in response to a freedom of information request by the Hungarian Civil Liberties Union (HCLU); copy on file with the Rapporteur. AC/35-D/2002-REV2 is hereinafter referred to as "NATO Security Committee, Directive on the Security of Information, 04.02.2005".

come across. It is easy to understand why an institution or state agency wishing to carry out clandestine operations would opt to bring them under the protections of the NATO model.

110. In addition to its own rules, NATO insists that strict regimes protecting classified information exist on a national level. The Membership Action Plan of 1999 implored the NATO "aspirants" – specifically, nine countries in Central and Eastern Europe – to introduce *"sufficient safeguards and procedures to ensure the security of the most sensitive information as laid down in the NATO security policy."*[73] Indeed commentators have rightly raised concern around the stringent rules on state secrecy that several countries have introduced as part of their accession to NATO[74] and, particularly, *"whether NATO's requirements are unduly biased against transparency [and] tilted toward secrecy to an unwarranted degree."*[75] It seems natural that such a security of information regime suited the purposes of the CIA.

111. Finally, with regard to the particular scope of my inquiry, it is apt to point out that NATO Allies and Partners have also developed various forms of co-operation in the realms of Air Defence and Air Traffic Management.[76] Inevitably these initiatives have developed new dimensions and complexities in the worlds of civil and military aviation, some of which may not yet be properly regulated and may permit unlawful clandestine operations using aircraft to pass "under the radar." In the course of analysing my database of aircraft movements, I have also noted that NATO has established a co-operation with Eurocontrol, which aims at *"developing civil-military air traffic procedures in the light of the new security environment."*[77]

ii. Bilateral arrangements

a. Securing agreements with certain countries to host "black sites" for HVDs

112. Despite the importance of the multilateral NATO framework in creating the broad authorisation for US counter-terrorism operations, it is important to emphasise that the key arrangements for CIA clandestine operations in Europe were secured on a bilateral level.

113. According to US sources, such bilateral arrangements (referred to simply as "bilaterals") exist under many different forms in Europe alone. For example, at the lower end of the range, bilaterals can institute ad hoc collaboration on a single operation to capture, detain or transfer a particular target. The well-documented cases of Abu Omar's abduction in Milan[78] and Khaled El-Masri's 23-day ordeal in a hotel in Skopje before being handed over to a rendition team[79] are instances in which the CIA worked with partner intelligence services in Italy[80] and the "former Yugoslav Republic of Macedonia",[81] respectively, in this manner.

[73] See NATO, "Membership Action Plan", Press Release NAC-S(99) 66, Brussels, 24.04.1999.

[74] For insight into the NATO secrecy and security of information regime and its negative impact on transparency in general, I have drawn from the work of the Canadian specialist on transparency issues, Professor Alasdair Roberts, who is based at the Maxwell School of Syracuse University in the United States. For specific articles, refer to Professor Roberts' website at www.aroberts.us/research.html.

[75] See Alasdair Roberts, "NATO, Secrecy and the Right to Information", *East European Constitutional Review*, (Fall / Winter 2003) 86, at p. 87.

[76] See NATO Partnership Action Plan against Terrorism, 22.11.2002, available at http://www.nato.int/docu/basictxt/b021122e.htm; at § 16.2.3.

[77] See Report on the Partnership Action Plan against Terrorism, 23.06.2004, available at http://www.nato.int/docu/basictxt/b040623be.htm; at § 7.4.

[78] For a detailed account of the abduction of the Egyptian citizen Hassan Osama Mustafa Nasr (known as Abu Omar) in Milan, see the Marty Report 2006, *supra* note 6, at p. 37, § 162. For an analysis of this case based on extensive [illegible] with insider sources in the CIA, see the recent article by Matthew Cole, "Blowback", GQ *Magazine*, March 2007, available at http://www.matthewacole.com/pdfs/Blowback-GQ.pdf.

[79] For a detailed account of the ordeal experienced by the German citizen Khaled El-Masri in Macedonia and Afghanistan, see the Marty Report 2006, *supra* note 6, at pages 25 to 32, paragraphs 93 to 132. For new details of this case, refer to section VI.i in the present report entitled "A case study of Khaled El-Masri."

[80] Reference to the particular service involved – SISMI – based on material from the prosecution case documents compiled by Armando Spataro.

[81] In "the former Yugoslav Republic of Macedonia", as I described last year, the partner service with which the CIA collaborated to detain and transfer Khaled El-Masri was the UBK – Uprava za Bezbednost i Kontrarazuznavanje, or the Security and Counter-intelligence Service. See the Marty Report 2006, *supra* note 6, in particular at pp. 29 to 30, §§ 116 to 118.

114. In the middle of this range, bilateral agreements signed pursuant to the multilateral NATO framework, and in conformity with NATO standards, have often encompassed elements of intelligence co-operation. Alternatively they have granted "civilian" components – a phrase often used loosely for those operating on behalf of the CIA – the same privileges and permissions that would normally be reserved for members of the military forces. Romania's "SOFA supplemental" agreement with the United States on 31 October 2001, analysed later in this section, appears to be a good example of such a middle-range "bilateral". It also demonstrates the potential for partnership and co-operation to intensify over a period of several years.

115. The bilaterals at the top of this range are classified, highly guarded mandates for "deep" forms of co-operation that afford – for example – "infrastructure", "material support" and / or "operational security" to the CIA's covert programmes. This high-end category has been described to us as the intelligence sector equivalent of "host nation" defence agreements – whereby one country is conducting operations it perceives as being vital to its own national security on another country's territory.

116. The classified "host nation" arrangements made to accommodate CIA "black sites" in Council of Europe member states fall into the last of these categories.

117. The CIA brokered "operating agreements" with the Governments of Poland and Romania to hold its High-Value Detainees (HVDs) in secret detention facilities on their respective territories. Poland and Romania agreed to provide the premises in which these facilities were established, the highest degrees of physical security and secrecy, and steadiest guarantees of non-interference.

118. We have not seen the text of any specific agreement that refers to the holding of High-Value Detainees in Poland or Romania. Indeed it is practically impossible to lay eyes on the classified documents in question or read the precise agreed language because of the rigours of the security-of-information regime, itself kept secret, by which these materials are protected.

119. However, we have spoken about the High-Value Detainee programme with multiple well-placed sources in the governments and intelligence services of several countries, including the United States, Poland and Romania. Several of these persons occupied positions of direct involvement in and/ or influence over the negotiations that led to these bilateral arrangements being agreed upon. Several of them have knowledge at different levels of the operations of the HVD programme in Europe.

120. These persons spoke to us upon strict assurances of confidentiality, extended to them under the terms of the special authorisation I received from my Committee last year.[22] For this reason, in the interests of protecting my sources and preserving the integrity of my investigations, I will not divulge individual names. Yet I can state unambiguously that their testimonies – insofar as they corroborate and validate one another – count as credible, plausible and authoritative.

121. I am convinced that these individuals who were or still are in highly-placed positions within the system spoke the truth to us. This was not always simply because they valued truth. In most cases they did so because, to paraphrase one high-ranking politician we interviewed, they did not want the truth to come out *on somebody else's terms*.

[22] Reference to the written record of the meeting of the PACE Committee on Legal Affairs and Human Rights (AS/Jur) in Paris on 13.03.2006 (Synopsis No 2006/25), by which the Committee authorised my inquiry to treat information in confidence. Based upon this authorisation, I engaged in an exchange of letters with European Commissioner Franco Frattini. Copies of this correspondence as well as the above-mentioned synopsis are held on file with the Rapporteur. The assurance of absolute confidentiality with which I have provided my sources, scrupulously observed by the team members who attended the interviews, has proven to be an important, if not decisive, asset to progress in our inquiry.

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122. In short, we used our considerable network of contacts in Poland, Romania, the United States and elsewhere, along with our own form of "intelligence work", to ensure that in our discussions with our sources, the "dynamics of truth" were also at play.

b. The United States' choice of European partners

123. It is interesting to note that the United States chose, in the case of Poland and Romania, to form special partnerships with countries that were economically vulnerable, emerging from difficult transitional periods in their history, and dependant on American support for their strategic development.

124. In terms of both political and intelligence considerations, several sources confirmed that much of the Eastern European "bloc" was considered "out of bounds" for the CIA in contemplating sites for its covert HVD programme. A long-serving CIA officer shared the following analysis with us:

> *"In a lot of those countries, there is still a mindset formed during the Cold War that we are not always on their side. There's a certain tendency to be less than open to our advances. You have to remember most of the East European services are KGB services and that doesn't change overnight.*
>
> *I think Poland is the main exception; we have an extraordinary relationship with Poland. My experience is that if the Poles can help us they will. Whether it's intelligence, or economics, or politics or diplomacy – they are our allies. I guess if there is a special relationship outside of the "four eyes"[23] group, then it is the Americans and the Poles."*

125. In Poland's case, a specific strategic incentive tied in with the NATO framework was the United States' staunch support for the establishment in Poland of the lucrative "NATINADS" programme – the NATO Integrated Air Defence System. Poland participated in the US-led military coalitions in both Afghanistan and Iraq, notably contributing significant Special Forces deployments to Operation Enduring Freedom,[24] and later assuming control of one of the "zones" of allied control in Iraq. An ongoing process of realignment and reform of intelligence structures is dedicated primarily to purging the secret services of so-called "communist remnants".

126. The United States negotiated its agreement with Poland to detain CIA High-Value Detainees on Polish territory in 2002 and early 2003. We have established that the first HVD was transferred to Poland in the late fall of 2003. In accordance with the operational arrangements described below, Poland housed what the CIA's Counterterrorism Centre considered its "most sensitive HVDs," a category which included several of the men whose transfer to Guantanamo Bay was announced by President Bush on 6 September 2006.

127. We received confirmations – each name from more than one source – of eight names of HVDs who were held in Poland between 2003 and 2005[25]. Specifically, our sources in the CIA named Poland as the "black site" where both Abu Zubaydah and Khalid Sheikh Mohamed (KSM) were held and questioned using "enhanced interrogation techniques." The information known about these interrogations has formed the basis of heated debate in the United States and the wider international community, leading, in Zubaydah's case[26], to high-level political and legislative manoeuvres and, in KSM's case, to the admission of some troubling judicial precedents[27].

[23] The "four eyes" group is this CIA officer's reference to the very strong four-way co-operation on intelligence matters between the secret services of the United States, Canada, the United Kingdom and Australia: "It's just a whole different degree of trust between those four."

[24] See Benashai, *Counterterror Coalitions*, supra note 37, at p. 10; Table 2.1, "Summary of European and Canadian Contributions to Operation Enduring Freedom".

[25] In addition to these sources, a single CIA source told us that there were "up to a dozen" HVDs in Poland in 2005, but we were unable to confirm this number. Among the eight names reported to us from several sources were Ramzi bin al-Shibh, Tawfiq bin Attash and Ahmed Khalfan Ghailani.

[26] The individual circumstances of Abu Zubaydah's interrogations remain largely unknown, but the introduction of "enhanced interrogation techniques" for the CIA's use on him has sparked the debate to which I refer. For an insightful early account of CIA interrogation practices, see Jane Mayer, "A Deadly Interrogation – Can the CIA legally kill a prisoner?" in *The New Yorker*, 14.11.2005, available at http://www.newyorker.com/archive/2005/11/14/051114fa_fact.

[27] Specifically I refer to the admission into evidence of the "Substitution for the Testimony of Khalid Sheikh Mohamed" in the context of the trial of Zacarias Moussaoui; as well as the well-founded reservations that the testimony in question had been procured under torture or other forms of ill-treatment. It is worth mentioning the troubling preamble transmitted to the jury introducing KSM's testimony: "Although you do not have the ability to see the witness' demeanour as he testifies, you must approach these statements with the understanding that they were made under circumstances designed to elicit truthful

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128. For reasons of both security and capacity, the CIA determined that the Polish strand of the HVD programme should remain limited in size. Thus a "second European site" was sought to which the CIA could transfer its detainees with "no major logistical overhaul". Romania, used extensively by United States forces during Operation Iraqi Freedom in early 2003, had distinct benefits in this regard: as a member of the CIA's Counterterrorist Centre remarked about the location of the proposed detention facility, "our guys were familiar with the area".

129. Our sources on both sides of the agreement – in Romania and the United States – emphasised the importance of both trust and national interest as factors underpinning their negotiations. Military assistance – reflected since in the Agreement of December 2005[88] – also significantly influenced the decision to provide facilities and resources, as one American source reflected:

> *"The bilateral arrangements were built on two things: personal relationships and material investment. If your men on the ground have a very good personal relationship with the men in the partner service; that means a lot. And it also means a lot if the Romanians are gonna get their runways improved, new barracks built and new military hardware; that means a lot."*

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130. Romania was developed into a site to which more detainees were transferred only as the HVD programme expanded. I understand that the Romanian "black site" was incorporated into the programme in 2003, attained its greatest significance in 2004 and operated until the second half of 2005. The detainees who were held in Romania belonged to a category of HVDs whose intelligence value had been assessed as lower but in respect of whom the Agency still considered it worthwhile pursuing further investigations.

131. Asked to provide names of those held in Romania, a senior official in the CIA's Counterterrorism Centre, who was directly involved in operating the programme, said: "*Look we don't talk about names, okay. We've got a target range that we know less about. We're acting on their intelligence] value when we're less certain.*"

132. Our sources told us that some of the targets in this "lower" HVD category had in fact been identified, and sometimes even apprehended, by a foreign intelligence service before they were made available to the CIA. Upon our strict assurance of anonymity, one CIA case officer was willing to describe limited details of a scenario in which a detainee had been "*offered to us by our liaisons*" and was later transferred to Romania. The detainee was of Afghan nationality.

133. Examples of the profile of those held in Romania were provided to us by two separate American sources. We understand that the profile fits categories such as:

- associates and suspected operatives of key Taliban leaders like Mullah Omar;
- foreign fighters suspected of having performed roles for the Taliban in Afghanistan, including provision of logistics;
- leaders of branches of suspected "support networks" for the insurgencies in Iraq and Afghanistan; or
- suspected leaders of terrorist factions in the Middle East.

statements from the witness." For the full testimony, and other materials related to the Moussaoui trial, see Reporters Committee for Freedom of the Press, "Moussaoui Trial exhibits and documents," available at http://www.rcfp.org/moussaoui/.

[88] For detailed discussion of the Agreement between Romania and the United States of December, dated 8 December 2005, refer to section II.M.b entitled "Application of the NATO framework in Romania."

134. The majority of the detainees brought to Romania were, according to our sources, extracted "*out of the theatre or country*". This phrase is understood as a reference to detainee transfers originating from Afghanistan and later Iraq.

135. More specifically, the description of an "out-of-theater" detention facility presents the mirror image of the kinds of prisons operated "in-theater," which are customarily referred to by United States Forces as "Theater Internment Facilities" – one notable example being the "Bagram Theater Internment Facility."[89] CIA detainees are known to have been held at facilities such as Bagram both before[90] and after[91] having been subjected to rendition, and to secret detention in other countries.

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iii. Responsible political authorities and preservation of secrecy in Poland and Romania

136. To reveal the means by which bilateral arrangements were put in place for CIA detentions in Poland and Romania, we must trace a trajectory of deepening co-operation with the United States that spans over several years. During the immediate post-9/11 period, when America was identifying its key strategic partnerships for the "war on terror," both Poland and Romania were in the midst of their own processes of "strategic realignment", eager to secure their positions as indispensable members of the NATO Alliance and friends of the United States.

137. In the course of a lengthy discussion with us about the CIA's choice of partner countries in Eastern Europe, one high-ranking Eastern European politician involved in the programme said to us:

> *"Poland and Romania; you don't know why? [it is] because we are the only two countries who are truly pro-Western. But now we are in danger of being seen as an experiment. It is most unfortunate."*

138. When America began developing its strategy for the "war on terror" under the NATO framework, Poland was already a member of the NATO Alliance, while Romania was a NATO "aspirant", or accession candidate. This difference in status proved to be of little consequence, however, as both countries followed remarkably similar paths in terms of harmonising their laws and structures with the NATO framework. The role of the United States was crucial to the reform processes in both countries, particularly in terms of the intelligence services and oversight structures that monitor them.

a. Application of the NATO framework in Poland

139. Poland became a member of NATO on 12 March 1999 and the multilateral NATO SOFA agreement entered into force in Poland in 2000.[92] In the five years directly preceding its NATO accession, Poland had signed several noteworthy agreements with the United States[93] in the realms

[89] For example, official documents refer admiratively to the "Bagram Theater Internment Facility" (or "BTIF") as the name given to the detention facility operated by the US Department of Defense at the Bagram Airfield in Afghanistan. See, *inter alia*, Declaration of Colonel Rose M. Miller, Commander of Detention Operations, CJTF-76, in *Rasoulkah et al v. Rumsfeld*, before the US District Court for the District of Columbia, 18.11.2005; at § 3.

[90] I have information in my possession relating to at least three different detainees who were held at Bagram before being transferred out to secret detention in another country. I have undertaken to treat this information in confidence, so I shall not refer here to names or precise periods in which they were detained.

[91] I reported last year on the case of Binyam Mohamed al-Habashi, an Ethiopian citizen and former UK resident, who was detained at Bagram between May and September 2004 after having been held in CIA custody in Pakistan, Morocco and the "Dark Prison" in Kabul, and subjected to two separate renditions. See the Marty Report 2006, *supra* note 6, at section 3.8, pp. 42 to 48.

[92] See Stefan Meller, Minister of Foreign Affairs of the Republic of Poland, Response of the Republic of Poland to Questions addressed by the Secretary-General of the Council of Europe with regard to Article 52 ECHR, dated 17.02.2006 (hereinafter "Response of Poland to CoE Secretary General under Article 52 ECHR"), available at http://www.coe.int/T/E/Com/Files/Events/2006-cia/Poland.pdf, at p. 5. The Polish authorities pointed out that: "The [NATO SOFA] Agreement, however, does not confer jurisdictional immunity on members of foreign armed forces, but elaborates the rules of determining jurisdiction with regard to prohibited acts on the territory of the host State. In particular, the Agreement grants the sending State the primary right to exercise jurisdiction over a member of its forces or of their civilian component in relation to offences arising out of any act or omission done in the performance of official duty [SOFA, Article 7(2)(a)]. It should also be underlined that in the light of the NATO SOFA, all members of the armed forces of a foreign State staying on the territory of the Republic of Poland are obliged to respect Polish law."

[93] For a full record of (unclassified) bilateral treaties between the United States and Poland, see US Department of State, *Treaties in Force – A list of Treaties and other International Agreements of the United States in Force on January 1, 2006*, "Poland", at pp. 263-266.

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of defence,[94] aviation,[95] extradition[96] and judicial assistance,[97] which paved the way for a very close co-operation both within and outside the NATO Alliance. [redacted] B5

140. Poland told the Council of Europe that, in addition to its obligations under multilateral treaties, it has concluded an unspecified number of "agreements governing special forms of co-operation."[98] Whilst we do not know the precise scope of these agreements, the one example given by the Polish authorities – that of "trans-frontier surveillance" – confirms that in at least some of their thematic coverage they pertain directly to the work of the intelligence services. We have been unable to obtain copies of Poland's "bilaterals" with the United States, which it is safe to assume fall under this bracket, because they are classified.

141. Poland's Classified Information Act, which entered into force in March 1999,[99] is part of a fairly typical apparatus among new NATO members[100] for dealing with sensitive information in accordance with the NATO Security Policy. For example, the Act's restrictive procedures for granting or denying "security clearance"[101] to individuals wishing to access classified information were challenged as unconstitutional by the Polish ombudsman.[102] However these provisions were compulsory for NATO membership and – of no small coincidence – would transpire to be vital to the preservation of secrecy around the operations of the CIA's HVD programme in Poland.

b. Application of the NATO framework in Romania

142. In the case of Romania, the processes of acceding to NATO and developing a bilateral framework with the United States, under which the CIA could operate on Romanian territory, proceeded almost simultaneously.

143. According to our sources, the statement of President Ion Iliescu[103] in response to the attacks of 11 September 2001 was Romania's "critical turning point." In that statement, President Iliescu signalled Romania's intention "to act as a *de facto* member of the NATO alliance," setting a clear tone at a time when fellow former Eastern-bloc countries were likewise scrambling to demonstrate their loyalty to the United States.

[94] See, for example, *Acquisition and Cross-Servicing Agreement*, with annexes, signed at Warsaw, 22.11.1996; entered into force 22.11.1996, TIAS.
[95] See, for example, *Memorandum of Agreement concerning Assistance in developing and modernising Poland's Civil Aviation Structure*, signed at Washington and Warsaw, 5 and 14.01 1999; entered into force 14.01.1999, TIAS.
[96] See *Extradition Treaty between the United States and the Republic of Poland*, signed at Washington, 10.07.1996, entered into force 17.09 1999, TIAS.
[97] See *Treaty on Judicial Assistance with Criminal Matters*, with forms. Done at Washington, 10.07.1996; entered into force 17.09.1999, TIAS.
[98] See Response *of Poland* to CoE Secretary General under Article 52 ECHR, *supra* note 94, at p. 3.
[99] See *Classified Information Act*, Polish Journal of Laws, No. 11, item 95; copy available from the Helsinki Foundation for Human Rights and the Helsinki Committee for Human Rights in Poland.
[100] On this point, see Alasdair Roberts, "NATO, Secrecy and the Right to Information", *supra* note 58.
[101] For commentary on the security clearance procedures by a local journalist, see Pawel Wronski, "Przeswietl sie i dowiedz sie. Z tajemnicami do NATO" (*Submitting to clearance and getting to know. Our secrets and NATO*), in *Gazeta Wyborcza*, No. 7, 9-10.01.1999.
[102] See International Helsinki Federation for Human Rights, *Human Rights in the OSCE Region: Report 2000 (Events of 1999)*, "Annual Report on *Poland*", available at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=1794, at p. 289.
[103] See Xinhua News Agency, "Romanian President Firmly Condemns Terrorism", Bucharest, Romania, 11.09.2001; excerpt available as part of a compilation entitled "NATO Aspirant Countries condemn the terrorist attacks on the USA", at http://diplomacy.president.bd.bg/nato_summit/en/condemnation.html. Just over a year later, in a statement during President Bush's visit to Bucharest on 23.11.2002, President Iliescu declared that the United States and Romania had "identical positions on the way to address the great challenges that the international community is facing, including the threat of terrorism."

144. Indeed, Romania could be said to have outdone even many NATO members in the immediacy of its demonstrations of support for the "war on terror." In its session of 19 September 2001, the Romanian Parliament gave its "formal approval" to President Iliescu's stated position and "approved basing and overflight permission for all US and coalition partners"[104] – thus pre-empting the North Atlantic Council's multilateral authorisations of 4 October 2001 by more than two weeks. A source involved in drafting this permission confirmed to us that its scope was deliberately designed to cover aircraft operated by or on behalf of the CIA. [redacted] B5

145. Furthermore the most important domestic implication of the Romanian Parliament's approval for President Iliescu's pro-American stance was that, in the process, it effectively mandated the President, working through his Office of National Security, to sign NATO-type agreements and bilateral operational orders with the United States.

146. In exercise of this mandate, President Iliescu negotiated and signed what the Romanian authorities describe as a "SOFA Supplemental"[105] – the *Agreement between Romania and the United States of America regarding the Status of US Forces in Romania*[106] - on 30 October 2001. Along with the multilateral NATO SOFA, this agreement is said by the Romanian authorities *generally* to "settle the jurisdiction, the legal responsibilities and other aspects regarding the status of one party's armed forces personnel... and of contractors of those armed forces when acting on the other party's territory".[107] In reality, however, they are *specifically* one-way arrangements, legislating for an increased size and scope of US activity on Romanian soil.

147. When examined with hindsight, the 2001 agreement reveals a permissive attitude on the part of the Romanian authorities, broadly towards US military and quasi-military operations on Romanian territory, and in particular towards the actions of American service personnel. The "SOFA Supplemental" created a "special regime of access on national territory",[108] which it extended not only to "members of the military forces"[109] in a conventional sense, but also to "members of the civilian airline companies"[110] and anyone else who is "declared by the American authorities to be part of the US armed forces, and can present a travel order issued by the US military". The breadth of the designation used here represented the perfect opening for the CIA to conduct its clandestine operations in the country.[111]

[104] See US Department of Defence, Fact Sheet of 7.06.2002, "International Contributions to the War against Terrorism", available at http://www.defenselink.mil/news/Jun2002/d20020607contributions.pdf.
[105] "Answers of the Romanian Delegation to the Questionnaire on the Alleged Secret Detention Centres", appended to the letter to me from Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, 20.01.2006; at p. 1. This agreement is said to be supplementary to the NATO SOFA of 1951, of which Romania only became a party when it joined NATO on 29.03.2004. It should be noted that in 2001, when Romania was not a party to the 1951 Agreement, it at the time relied upon its signature of the PfP SOFA of 1995 as the basis for its supplemental. See the section III. earlier in this report on the the wider NATO system and the "war on terror", and the accompanying references, *supra* notes 42.
[106] See the *Agreement between Romania and the United States of America regarding the Status of US Forces in Romania*, signed at Washington, DC on 30.10.2001; entered into force on 10.06.2002, TIAS (hereinafter referred to as "Romanian SOFA Supplemental"). For a full record of (unclassified) bilateral treaties between the United States and Romania, see US Department of State, *Treaties in Force – A list of Treaties and other International Agreements of the United States in Force on January 1, 2006*, "Romania", at pp. 270 to 272.
[107] "Answers of the Romanian Delegation to the Questionnaire on the Alleged Secret Detention Centres", appended to the letter to me from Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, 20.01.2006; at p. 1.
[108] This phrase is understood to describe the permission given to "enter, exit and move freely within the territory", with a US military travel order sufficing as identification.
[109] See Romanian SOFA Supplemental, 30.10.2001, *supra* note 106, at Article II(2).
[110] It is unclear whether this reference to "the civilian airline companies" indicates that there is a specific numbered or named list of US-registered companies whose members fall under the "special regime of access" referred to. However, in a comparable scenario, it has in the past been disclosed in documents released by the US Department of Defence under a Freedom of Information Act request that specific US aviation companies (including several of those known to be involved in detainee transfer operations) have been awarded "classified contracts" by certain units of the US armed forces. See Seth Hettena, The Associated Press, "Navy contracted planes used in CIA missions", 24.09.2005, available at http://www.usatoday.com/news/washington/2005-09-24-navy-cia_x.htm
[111] In addition, it is known that the meanings of important "cover" designations often used by the CIA are set forth in the 2001 SOFA Supplemental. These include the terms "civilian component", "dependent" and "United States contractor" – all of which categories were also granted the same permissions and protections as conventional military officers. Unfortunately, I have not as yet been able to obtain the sections of the agreement in which the meanings of these terms are defined.

148. It is my conclusion that under the October 2001 bilateral agreement, along with any additional classified annexes agreed at that time or subsequently, personnel brought into the country under the banner of the United States military have in practice operated on Romanian territory with complete freedom from scrutiny or interference by their national counterparts ever since.

149. In this context it is important to consider a more recent "access agreement" between Romania and the United States, signed on 6 December 2005, which deals primarily with the activities of US forces based at a selected number of Romanian military facilities.[112]

150. Under this new agreement, US forces – including their "civilian component" – enjoy extraordinarily free use of certain Romanian airbases and other facilities for "training, transit... refuelling of aircraft, accommodation of personnel, communications, staging and deploying of forces and material ... and for other such purposes as the Parties or their Designated Authorities may agree."[113]

151. In terms of permissions, all US Government aircraft and vehicles are "free from inspection." In addition, an apparently blanket authorisation to "over-fly, conduct aerial refuelling, land and takeoff in the territory of Romania" is granted to both US Government aircraft and "civil aircraft ... operating exclusively under contract to the United States Department of Defense."[114] Indeed, an equally permissive approach is applied to almost every aspect of the agreement, from the "construction activities" undertaken by US forces[115] to the apparently unquestioning acceptance as "valid" of "all professional licences."[116]

152. In terms of protections, Romania's key obligations seem to be to give "due regard to United States' operational and security concerns,"[117] and to "take all reasonable measures within its power to ensure the protection, safety and security of United States forces property."[118]

153. I have viewed the Romanian Access Agreement in sharpest focus, however, when I consider it in the light of testimony received from Romanian and American officials about the bilateral "operating agreements" that prevailed previously. Sources on both sides confirmed to me that the provisions of the December 2005 Access Agreement are best understood as arrangements that have prevailed for several years but have only latterly been formalised.

154. This incremental method of formalising such "bilaterals" has in fact been used by the US in other countries in which its forces have been undertaking important detention operations in the context of the "war on terror." The most conspicuous example is Afghanistan, where last year's Accommodation and Consignment Agreement for Lands and Facilities at Bagram Airfield[119] (signed on 28 September 2006) represents the furthest extension of the US model of permissions and protections that I have yet to encounter.[120] It was described in testimony before a US court as being an agreement

[112] *See Agreement between the United States of America and Romania regarding the activities of United States Forces located on the territory of Romania*, done at Bucharest, 6.12.2005; (hereinafter "Romanian Access Agreement"); copy on file, submitted officially to the Rapporteur in May 2006 after its adoption by the Romanian Parliament. It is worth pointing out that the references to "Implementing Arrangements" in this text afford the Parties a considerable degree of latitude as to how they put the agreement into practice: "The technical details regarding the agreed facilities and areas shall be in accordance with Implementing Arrangements to be concluded for each facility and area" [at Article II(1)]; and "As appropriate, the Parties or their Designated Authorities may enter into Implementing Arrangements to carry out the provisions of this Agreement" [at Article XI].

[113] See Romanian Access Agreement, 6.12.2005, *ibidem*, at Article II(1). It is relevant to note that the "Designated Authorities" in question are the Ministry of National Defence of Romania and the Department of Defense of the United States of America, respectively.

[114] See Romanian Access Agreement, 6.12.2005, *ibidem*, at Article VII. In the final clause, the fact that the exempted civil aircraft have to be under exclusive contract to the Department of Defense (rather than the US Government more generally) is a clear indication of the military nature of the arrangements.

[115] See Romanian Access Agreement, 6.12.2005, *ibidem*, at Article II(4).

[116] See Romanian Access Agreement, 6.12.2005, *ibidem*, at Article IX.

[117] See Romanian Access Agreement, 6.12.2005, *ibidem*, at Article II(3).

[118] See Romanian Access Agreement, 6.12.2005, *ibidem*, at Article VI(1).

[119] See the *Accommodation Consignment Agreement for Lands and Facilities at Bagram Airfield between the Islamic Republic of Afghanistan (represented by HE General Abdul Rahim Wardak, Minister of Defense) and the United States of America*, made and entered into by the Host Nation and the Lessee on 28.09.2006 (hereinafter referred to as the "Bagram Agreement"); copy on file with the Rapporteur.

[120] See, for example, the Bagram Agreement, 28.09.2006, *ibidem*, at § 8: "The Host Nation [Afghanistan] covenants and warrants that the United States shall have exclusive, peaceable, undisturbed and uninterrupted possession of the Premises during the existence of this agreement. The United States shall hold and enjoy the Premises during the period of the agreement without any interruption whatsoever by the Host Nation or its agents." As is clearly stated in § 13, the Bagram Agreement of 2006 "supersedes all previous agreements between the United States and Host Nation for the use of Bagram Airfield" – implicitly meaning that any formal or informal arrangements that had prevailed prior to September 2006 had finally been brought

that "follows similar such arrangements dating back to at least 2003".[121] Indeed, I am aware of an earlier document referred to as "Note No. 202",[122] which indicates that the initial bilateral arrangements in Afghanistan – in strikingly similar terms to the situation in Romania – were agreed upon essentially by members of the executive[123] without reference to parliamentary oversight mechanisms.

155. The Romanian authorities have indicated to us on two occasions that the NATO framework described here has been the basis for the operations of the CIA in Romania. The first reference came in response to my question about whether the Government is "systematically informed of the activities of foreign secret services (in particular the CIA) on national territory."[124] Romania replied[125] by citing the NATO framework's *Agreement on Classified Information* and a bilateral *military* instrument, the *Agreement on the Protection of Military Classified Information*,[126] thus making clear that CIA activities now fall unambiguously under the secrecy regime instituted under the NATO Security Policy. As in several other Eastern European countries who adopted more stringent secrecy policies as part of their NATO accession, Romania's legislation on classified information was expedited through Parliament[127] and criticised by civil society for being unbalanced.[128]

156. The second reference was part of an apparent acceptance, in principle, that United States agencies and personnel have carried out detainee transfer operations in Romania in the context of the NATO framework. The following statement was delivered by the Chairperson of the Romanian Delegation to PACE, Mr Gyorgy Frunda, during the PACE Plenary Debate on my report in June 2006:

> "*Concerning the transfer of prisoners, from the first moment we said that Romania collaborated with the United States and with other members of NATO. Aircraft landed in Romania and transported persons. We did not and do not know who the persons are because, do not forget, the aircraft are under the authority of the countries where they are registered. The countries in which the airports are located do not have legal instruments to see what happens on board. That is why United States authorities have to answer not only political but juridical questions about whether persons were harassed or wrongly treated on the airplanes.*"[129]

into one coherent written text. A similar situation can surely be said to apply in Romania with the signature of the Access Agreement of December 2005.

[121] See Declaration of Colonel Rose M. Miller, Commander of Detention Operations, CJTF-76, in *Ruzatullah et al v. Rumsfeld*, before the US District Court for the District of Columbia, 19.11.2006; at § 5. Also note Colonel Miller's statements that "each nation separately controls access to its respective compound on the Airfield" and that "the US does not have complete, plenary jurisdiction".

[122] Note No. 202, dated 26.09.2002, is reproduced in a translated document obtained by Amnesty International, which transmits the concurrence of the Afghanistan Ministry of Foreign Affairs with this note to the US Embassy in Kabul; see Document No. 93 of the Ministry of Foreign Affairs (America and Canada Political Affairs Division), dated 28.05.2003.

[123] Note No. 202 was signed by the Minister of Foreign Affairs of the Transitional Islamic State of Afghanistan, Doctor Abdullah, on behalf of the transitional government. No reference is made to any pursuant procedure for approval of this document, nor am I aware of one having taken place. Furthermore, in the final paragraph, "the parties waive any and all claims against each other for damage to or loss or destruction of property owned by either party, or death or injury to any military or civilian personnel of the armed forces of either party, as a result of activities in Afghanistan under this agreement."

[124] See my letter of 15.12.2006 to Chairpersons of National Delegations to PACE, which contained "Questions which members of the Parliamentary Assembly might put to their respective governments in their national parliaments," reproduced as Appendix II to *Information Memorandum II*, 22.01.2006.

[125] "Answers of the Romanian Delegation to the Questionnaire on the Alleged Secret Detention Centres", appended to the letter to me from Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, 20.01.2006; at p. 1.

[126] See the *Agreement between Romania and the United States of America on the Protection of Military Classified Information*, done in Washington, 21.06.1995, entered into force 2003; cited *ibidem*.

[127] Alasdair Roberts cites a revealing news report about the passage of the Romanian legislation in April 2002: "[On 3 April] a certain Colonel Constantin Raicu [of the Romanian Intelligence Service], who is in charge of the protection of state secrets, came down like a storm on the members of the Senate Juridical Commission, telling them: 'This morning we have received signals from [NATO in] Brussels indicating that if the bill on classified information is not passed before 10 April, they cannot exclude adopting a critical attitude regarding Romania. We agree with any form – the colonel added – but please, pass it as soon as possible, or we will be facing huge problems.' The Senators... grasped the situation very quickly, and they approved the draft bill in the form passed by the Chamber of Deputies." See *Bucharest Ziua*, "NATO used as a Scarecrow to pass Law on Secrets," 08.04.2002, www.ziua.ro, cited in Alasdair Roberts, "NATO, Secrecy and the Right to Information", *supra* note 88, at p. 87.

[128] See International Helsinki Federation for Human Rights, *Human Rights in the OSCE Region: Report 2002 (Events of 2001)*, "Annual Report on Romania", available at http://www.ihf-hr.org/documents/doc_summary.php?sec_id=3&d_id=1782, at p. 257.

[129] Contribution of Mr Gyorgy Frunda, Chairperson of the Delegation of Romania to PACE, at the 17th Sitting of the Plenary of the Parliamentary Assembly during its 2006 Session, Strasbourg, 27.06.2006.

157. Our continuing investigations since June 2006 have allowed us to put this statement into context. Romania is right to state that the NATO framework on the multilateral level did enable detainee transfers through many Council of Europe member states, including larger nations like Germany mentioned in my report last year. Romania, like Poland, went beyond the multilateral framework, however, when it expanded the scope and purpose of the authorisations it granted the United States. According to one of our sources involved in making the key bilateral arrangements, Romania "knew what the United States needed from its allies and in what areas we could assist them." It was therefore perceived to be in the national interest to extend a further level of support: "[having] worked on the secret flights... we worked directly with associates of the CIA on establishing prisons here."

c. Preserving secrecy through military intelligence partnerships

158. In the course of our discussions with intelligence officials in the United States, a senior member of the CIA Counterterrorist Center made the following remarks to our team:

> "Many European countries have multiple security services. And in most countries the Agency deals with all of them: with the police, with the anti-terrorism police, with foreign intelligence, with other units – and of course with military intelligence ... But for the HVD programme we worked strictly in line with 'need-to-know'."

159. There are two essential items of information in this statement, both of which have ultimately proved indispensable to our understanding of how the HVD programme worked in Europe. One item – military intelligence partnership – goes to the heart of how the CIA formed its relationships; the other – preservation of secrecy – reveals important structural considerations. I shall deal with the structural considerations first.

d. Preserving secrecy and NATO Security Policy

160. Our source's use of the expression "need-to-know" encapsulates one of the means used to keep the HVD programme in Europe secret.[130] Through discussion with several other sources we have established that classified information about the bilateral arrangements between the CIA and its partner services in Poland and Romania was treated according to a strict security of information regime drawn from the terms of NATO's Security Policy.

161. Under the terms of the NATO Security Policy,[131] "individuals in NATO nations ... shall only have access to NATO classified information for which they have a need-to-know. No individual is entitled solely by virtue of rank or appointment or PSC [Personnel Security Clearance] to have access to NATO classified information."[132] In the context of the HVD programme, according to a senior CIA official, the CIA classified its operational information into "tiny little pieces," each of which would be assessed separately under the "need-to-know" principle in order to prevent any single foreign official from seeing the "bigger picture" of what was actually happening:

> "The Agency could be bringing UBL [Usama bin Laden] himself from an airplane into a prison in your country, but on every tiny little piece of the classified operational information, if we figure you don't need to know that information then frankly, as an individual, you will never know it."

[130] We initially probed into the means used to keep the HVD programme secret because of a tip-off from an insider source. The source had indicated that the NATO framework "holds the key" to understanding the European dimension of the programme, in terms of both "physical security and security of information."
[131] See NATO, Security within the North Atlantic Treaty Organisation, 17.09.2002, *supra note 73*. The policy is designed to ensure that a "common degree of protection" is applied both to NATO's own information and to information exchanged among NATO members on a bilateral level. Both categories of information are referred to as "NATO classified information" in the context of this policy.
[132] *Ibidem*, in Enclosure "C" – *Personnel Security*, at the section entitled "Application of the 'Need-to-Know' Principle," p. 2, § 6. In a handbook accompanying an earlier version of the policy, this "fundamental principle" was referred to mean that information should be limited in its distribution for work purposes only, and not "merely because a person occupies a particular position, however senior." See NATO Security Committee, *A Short Guide to the Handling of Classified Information*, Document AC/35-WP/14.4, Brussels, 22.06.1988

162. The body that generates any piece of classified information retains what is known as "originator control,"[133] an undisputed right to set parameters as to which individuals receive the information, how they are briefed, what they are allowed to do with the information, and whether the information will ever be declassified, or have its classification reduced.[134] It is generally accepted that "the principle of originator control trumps the need-to-know principle;"[135] otherwise put, based on this principle, the CIA was able to exclude from the information loop even those individuals (specifically, some politicians) whom it might have perceived to have a genuine need to know the "bigger picture."

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163. Finally, the CIA's choice of its "point man" in Poland and Romania – key individuals in each country who vouched for absolute, unwavering adherence to the rules by their own national services – reflected the same considerations of "loyalty, trustworthiness and reliability"[136] integral to NATO rules on personnel security. When discussing the kinds of people as their liaisons, our CIA sources referred to relationships of "trust developed over decades" and interpretations of national security issues that were "99% in harmony with one another".

164. By preserving the secrecy of the covert HVD programme on a NATO-compliant basis, the CIA achieved several of its central objectives: it hand-picked the services and the "point men" it would work with in the countries in question; it limited to an absolute minimum the number of Polish and Romanian counterparts who knew about even "tiny little pieces" of these operations in their own countries; and it ruled out any distribution whatsoever of the classified information beyond these small circles, unless expressly approved by the US Government itself.

165. Yet none of these restrictive rules mitigates the fact that Poland and Romania, as host countries, were knowingly complicit in the CIA's secret detention programme. When we sought confirmation from one of our sources in the CIA that these were bilateral (rather than unilateral) arrangements, and that every programme was carried out with the express authorisation of the relevant partner state, we received this emphatic response:

> "One of the great enduring legacies of the Cold War, which has carried into these alliances, is that NATO countries don't run unilateral operations in other NATO countries. It's a tradition that is almost sacrosanct. We [the CIA] just don't go trampling on other people's turf, especially not in Europe."

166. Hence the importance of our source's affirmation that the CIA forms important intelligence partnerships not just with civilian counterparts but also in the *military* sphere. As our inquiry progressed, we realised that the CIA's fellow civilian intelligence agencies (domestic and foreign) are not necessarily the most appropriate choices as partners or liaisons on highly sensitive operations due to their encumbered civilian oversight mechanisms. Thus, an integral part of our investigative strategy, building on our knowledge of the NATO framework, was to apply equal scrutiny to the CIA's partnerships with military intelligence services.

[133] *Ibidem*, in Enclosure "B" – Basic Principles and Minimum Standards of Security, at the section entitled "Basic Principles," p. 3, § 9(g).
[134] *Ibidem*. See, *inter alia*, Enclosure "B" – Basic Principles and Minimum Standards of Security, at the section entitled "Basic Principles," p. 2, § 8(b): "classified information shall be disseminated solely on the basis of the principle of need-to-know to individuals who have been briefed on the relevant security procedures... only security cleared individuals shall have access."
[135] See Alasdair Roberts, "NATO, Secrecy and the Right to Information", *supra note 64*, at p. 88.
[136] *Ibidem*, in Enclosure "B" – Basic Principles and Minimum Standards of Security, at the section entitled "Personnel Security," p. 4, § 11; see also the supporting provisions in Enclosure "C" – Personnel Security, pp. 1-4. In the previous version of the NATO policy, C-M(55)15(Final) as released in 1964, anyone receiving a security clearance was assessed to have shown "unquestioned loyalty [and] such character, habits, associates and discretion as to cast no doubt upon their trustworthiness."

III. Secret detention operations in Poland

i. Partnering with military intelligence in Poland

167. Since the May 2002 "quasi-reform"[137] of its secret services, Poland has had two civilian intelligence agencies: the Internal Security Agency (*Agencja Bezpieczenstwa Wewnetrznego, or ABW*); and the Foreign Intelligence Agency (*Agencja Wywiadu, or AW*). Neither of these services was considered a viable choice as a CIA partner for the sensitive operations of the HVD programme in Poland, precisely because they are "subject to civil supervision, both by Parliament and Government."[138] Since their creation, the Heads of both the *ABW* and the *AW* have been appointed and tasked by the Prime Minister, and are directly accountable to the Council of Ministers, initially through a Cabinet Committee chaired by the PM (*Kolegium do Spraw Sluzb Specjalnych*) and latterly through the position of Minister-Coordinator for the Special Services.[139] The *ABW* and the *AW* are both also answerable to the Commission for Special Services in the Polish Parliament (*Sejmowa Komisja do Spraw Sluzb Specjalnych*).

168. According to our sources, the CIA determined that the bilateral arrangements for operation of its HVD programme had to remain absolutely outside of the mechanisms of civilian oversight. For this reason the CIA's chosen partner intelligence agency in Poland was the Military Information Services (*Wojskowe Sluzby Informacyjne, or WSI*), whose officials are part of the Polish Armed Forces and enjoy "military status" in defence agreements under the NATO framework. The *WSI* was able to maintain far higher levels of secrecy than the two civilian agencies due to its recurring ability to emerge "virtually unscathed"[140] from post-Communism reform processes designed at achieving democratic oversight.

169. The *WSI* was formally accountable to the Minister of Defence, but our sources describe it as having operated more as a kind of "cartel" serving the self-interests of particular elite groups. I find it especially interesting that Poles we spoke to regard the processes of military intelligence reform[141] as smokescreens aimed at *obstructing* transparency and *preserving* corrupt access to state resources.[142] There is no doubt that the *WSI* is an agency quite accustomed to covert action that challenges the boundaries of legality and morality.

[137] See Andrzej Zybertowicz, 'An Unresolved Game – The role of the Intelligence Services in the nascent Polish Democracy', conference paper published jointly by the Geneva Centre for the Democratic Control of Armed Forces (DCAF), the Norwegian Parliamentary Intelligence Oversight Committee, and the Human Rights Centre at the Department of Law, Durham University, Oslo, September 2003, copy on file with the Rapporteur (hereinafter "Zybertowicz, The Role of the Polish Intelligence Services"), at p. 2: "when the Polish Parliament passed the new law on secret services... instead of explanation of [the] many scandals and taking legal measures towards those responsible, instead of accountability, the public opinion has been offered a quasi-reform of the services. It deserves this label because, among other things, it did not meet [the] objects of its own designers."

[138] See Response of Poland to CoE Secretary General under Article 52 ECHR, supra note 84, at p. 2. The phrase is used in this context to describe the system of oversight for the *AW*: "Parliament [the *Sejm*] exercising its prerogatives through the Commission for Special Services, also controls the Polish Foreign Intelligence Agency in matters relating to its co-operation with partner secret services of other States."

[139] The position of Minister-Coordinator for the Special Services was created in November 2005 and is presently filled by Minister Zbigniew Wassermann.

[140] See Zybertowicz, The Role of the Polish Intelligence Services, supra note 138, at pages 3 and 6-7.

[141] Reform of the military intelligence services in Poland has been a contentious issue since the early 1990s, and a topical one throughout my mandate as Rapporteur. Prior attempts at regulating the *WSI* appear to have been half-hearted, at best. From its creation in August 1991 to December 1996 it operated exclusively under secret military orders; then until July 2003 it came under the nominal control of the Ministry of Defence, but without close legal oversight. Even the Law on the Military Secret Services passed by Parliament on 9.07 2003 contained no external verification procedures. Since late 2006, at the instruction of Prime Minister Jaroslaw Kaczynski, the *WSI* has been gradually dissolved and replaced by a restructured military counter-intelligence unit. Deputy defence minister Antoni Macierewicz, who heads the new unit, published a report on the dissolution in February 2007, but the process appears to have done little to assuage public scepticism or criticism. For analysis of the report and reactions to it, see *inter alia* Joanna Najfeld, "Polish Military Intelligence Involved in Illegal Activities," Network Europe, 23.02.2007, available at [illegible]

[142] See also Zybertowicz, The Role of the Polish Intelligence Services, supra note 138, at pages 6-7. The author lists what he sees as the objects of "self-reform" in the *WSI*, including "to prevent outsiders – including democratically established control and oversight bodies – from obtaining thorough access to the Services", "to present the *WSI* as a useful ally to the NATO authorities", and to retain an "upper hand in economic institutional rearrangements, including key financial flows and major privatisation schemes."

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170. From our interviews with current and former Polish military intelligence officials, we have established that the *WSI*'s role in the HVD programme comprised two levels of co-operation. On the first level, military intelligence officers provided extraordinary levels of physical security by setting up temporary or permanent military-style "buffer zones" around the CIA's detainee transfer and interrogation activities. This approach was deployed most notably to protect the CIA's movements to and from, as well as its activities within, the military training base at Stare Kiejkuty. Classified documents, the existence of which was made known to our team, describe how *WSI* agents performed these security roles under the guise of a Polish Army Unit (*Jednostka Wojskowa*) denoted by the code *JW-2669*, which was the formal occupant of the Stare Kiejkuty facility.[143]

171. On the second level, the *WSI*'s assistance depended to a large extent on its covert penetration of other state and parastatal institutions through its collaboration with undercover "functionaries" in their ranks. Our sources have indicated to us that *WSI* collaborators were present within institutions including: the Polish Air Navigation Services Agency (*Polska Agencja Zeglugi Powietrznej*), where they assisted in disguising the existence and exact movements of incoming CIA flights;[144] the Polish Border Guard (*Strazy Granicznej*), where they ensured that normal procedures for incoming foreign passengers were not strictly applied when those CIA flights landed; and the national Customs Office (*Glówny Urzad Celny*), where they resolved irregularities in the non-payment of fees related to CIA operations. Thus the military intelligence partnership brought with it influence throughout a society-wide "undercover community,"[145] none of which was checked by the conventional civilian oversight mechanisms.

172. When asked to give an example of a *WSI* collaborator who occupied an important position in the operation of the CIA's covert programme, several Polish sources named Mr Jerzy Kos, former Chairman of the Board of Mazury-Szczytno Airport Company (*Porty Lotnicze "Mazury Szczytno"*) and Director of Szymany Airport throughout 2003 and 2004.[146] A source in Polish military intelligence said: "anyone who has contact with the Americans is our man. The Director [Kos] is our man". Another senior Polish official familiar with the arrangements explained to us:

> "Polish military intelligence operatives were appointed to these positions. We said to place them anywhere with importance to the way this programme is run. This is how you come to know Mr Kos as the Director at Szymany Airport."

173. Mr Jerzy Kos went on to become a director of the Polish private construction company "*Jedynka Wroclawska SA*" and was taken hostage in Iraq in June 2004 whilst pursuing company projects there. When Mr Kos was brought to safety shortly afterwards in a rare raid by US Special Forces,[147] media outlets reported that the rescue operation attested to Mr Kos' links to the intelligence services.[148] Indeed, my inquiry has been informed that Mr Kos' "connections with [the] Polish secret service" in his business affairs have been "confirmed quite unambiguously"[149] during judicial

[143] One of the few means of verifying – through independent public sources – the fact that *JW-2669* was stationed at Stare Kiejkuty during this period is through photogrammetric studies of activity on Internet servers by users with particular "net-names". In outputs from such studies, *inter alia* of 23.10.2003, the "net-name" *JW-2669* is registered as being assigned to "Jednostka Wojskowa 2669, Stare Kiejkuty".

[144] For more information on the means used to cover up CIA flights into Poland, see section III.iii below, entitled "The anatomy of CIA secret transfers and detentions in Poland."

[145] As in many former communist countries, the secret services in Poland are accustomed to using networks of operatives and informants that span many of the most important institutions of the state, as well as the private sector. These networks comprise what is known as the "undercover community." For a description of this "crucial notion" in Poland, which the author refers to as "the security complex," see Zybertowicz, The Role of the Polish Intelligence Services, supra note 138, at pages 4-5.

[146] Between 2002 and 2004, the commercial company headed by Mr Kos shared responsibility for operating Szymany Airport with a military unit stationed on site. The airport had a mixed "civil-military" character, whereby aircraft registered as undertaking "military flights" were dealt with under special procedures.

[147] See, for example, Fox News, "Polish Iraq Hostage Praises US Rescuers", Warsaw, 10.06.2004; available at http://www.foxnews.com/story/0,2933,122358,00.html.

[148] The Italian press, for example, reported that Mr Kos was the "007 of Warsaw" and bore a "subcutaneous microchip" that allowed rescuers to trace the location at which he and his fellow hostages were being held; see *La Repubblica*, "Ostaggi liberati grazie a un microchip sottopelle", 16.06.2004, available at [illegible]. On 15.06.2004 AP quoted Mr Kos himself as having said: "They [the kidnappers] thought I am an American co-operating with the CIA and I tried to explain that I am a Pole, that I was there to build houses."

[149] Letter to my inquiry from Justice Jaroslaw Horoblowski, Judge in the District Court for Wroclaw-Fabryczna (Bankruptcy and Pre-insolvency Proceedings), dated 7.11.2006, copy on file with the Rapporteur. Mr Kos' business affairs given as examples by Justice Horoblowski in this regard are "his role [with] Jedynka Wroclawska in Iraq, his mysterious kidnapping, then [the] strange circumstances of his rescuing, and his being director of the (former military) airport in Szymany." Justice Horoblowski also states that the revelations about secret service connections were made by some former directors of the company.

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proceedings[150] relating to the subsequent bankruptcy of *Jedynka Wrocławska*. As a military intelligence operative facilitating the uniquely sensitive covert actions of the CIA in Poland, Mr Koś was one link in a chain of operations that led right to the top of Polish Government.

II. Responsible political authorities in Poland

174. During several months of investigations, our team has held discussions with various Polish sources, including civilian and military intelligence operatives, representatives of state or municipal authorities, and high-ranking officials who hold first-hand knowledge of the operations of the HVD programme in Poland. Based upon these discussions, which have come to the same conclusions, my inquiry allows me to state that some individual high office-holders knew about and authorised Poland's role in the CIA's operation of secret detention facilities for High-Value Detainees on Polish territory, from 2002 to 2005. The following persons could therefore be held accountable for these activities: the President of the Republic of Poland, Aleksander KWASNIEWSKI, the Chief of the National Security Bureau (also Secretary of National Security Committee), Marek SIWIEC, the Minister of National Defence (Ministerial oversight of Military Intelligence), Jerzy SZMAJDZINSKI, and the Head of Military Intelligence, Marek DUKACZEWSKI.

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175. In my analysis the hierarchy for control of the Polish Military Information Services, or *WSI*, was chronically lacking in formal oversight and independent monitoring. As a result the structure described here from 2002 to 2005 depended to a great extent on close relationships of trust and professional familiarity, both among the Polish principals and between the Poles and their American counterparts. Several of our sources characterised the bonds between these four individuals as being a combination of loyal personal allegiance ("we all serve one another") and strong common notions of national duty ("... but first we serve the Republic of Poland").

176. There was complete consensus on the part of our key senior sources that President Kwasniewski was the foremost national authority on the HVD programme. One military intelligence source told us: "Listen, Poland agreed from the top down... From the President – yes... to provide the CIA all it needed." Asked whether the Prime Minister and his Cabinet were briefed on the HVD programme, our source said: "Even the *ABW* [Internal Security Agency] and *AW* [Foreign Intelligence Agency] do not have access to all of our classified materials. Forget the Prime Minister, it operated directly under the President."

177. Our investigations have revealed that the state office from which much of the strength of this Polish accountability structure derived was the **National Security Bureau** (*Biuro Bezpieczeństwa Narodowego, or BBN*), located in the Chancellery of President Kwasniewski. Our sources confirmed to us that the bilateral operational arrangements for the HVD programme in Poland were "negotiated on the part of the President's office by the National Security Bureau [BBN]."

178. Marek Dukaczewski, an outstanding military intelligence officer ultimately promoted to the rank of General, served the BBN in the Chancellery of his close friend Aleksander Kwasniewski for the first five years of the latter's Presidency, from 1996 to 2001. Mr Dukaczewski worked directly alongside Marek Siwiec during this period, whilst Mr Siwiec was a Secretary of State in the Presidential Chancellery and then became Chief of the BBN. Jerzy Szmajdzinski was appointed Minister of National Defence for Mr Kwasniewski's second term, in October 2001. Shortly afterwards, Mr Dukaczewski was nominated Head of the Military Information Services, the *WSI*, starting in December 2001.

[150] In addition to the statements in court, trade unionists wrote an open letter stating that Mr Koś' posting to Iraq may also have entailed some intelligence functions. See letter on behalf of *Jedynka Wrocławska* SA to Wrocław Prosecutor Leszek Karpiuk, dated 28.04.2005, copy on file with the Rapporteur.

179. Besides this accountability structure, which remained in place from the immediate aftermath of the 11 September 2001 attacks throughout Poland's involvement in the CIA's covert HVD programme, probably no other Polish official had knowledge of it. Indeed, the "highest level of classification" at national and intergovernmental levels, understood to match NATO's "Cosmic Top Secret" category,[151] still attaches to the information pertaining to operations in Poland. Our unravelling of such secrecy to expose Polish participation in unlawful detention and transfer operations is perhaps the greatest testament to the "dynamics of truth" in motion. However an alternative interpretation, which provided my inquiry with motivation in the face of systematic cover-up, came in one of our most memorable moments of testimony from a top-level Polish source. He stated simply:

> *"Listen, there are no secrets in war. There is no intelligence in war. You cannot keep something secret in a time of conflict."*

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III. The anatomy of CIA secret transfers and detentions in Poland

180. Notwithstanding the approach of the Polish authorities towards this inquiry,[152] our team was able to uncover new documentary evidence from two separate Polish sources showing actual landings in Poland by aircraft associated with the CIA.

181. These sources corroborate one another and provide the first verifiable records of a number of landings of "rendition planes" significant enough to prove that CIA detainees were being transferred into Poland. I can now confirm that at least ten flights by at least four different aircraft serviced the CIA's secret detention programme in Poland between 2002 and 2005. At least six of them arrived directly from Kabul, Afghanistan during precisely the period in which our sources have told us that High-Value Detainees (HVDs) were being transferred to Poland. Each of these flights landed at the same airport I named in my 2006 report as a detainee drop-off point: Szymany.

182. The most significant of these flights, including the aircraft identifier number, the airport of departure (ADEP), as well as the time and date of arrival into Szymany, are the following:

i. N63MU from DUBAI, arrived in SZYMANY at 14h56 on 5 December 2002
ii. N379P from RABAT, arrived in SZYMANY at 02h23 on 6 February 2003
iii. N379P from KABUL, arrived in SZYMANY at 16h00 on 7 March 2003
iv. N379P from KABUL, arrived in SZYMANY at 18h03 on 25 March 2003
v. N379P from KABUL, arrived in SZYMANY at 01h00 on 5 June 2003
vi. N379P from KABUL, arrived in SZYMANY at 02h58 on 30 July 2003
vii. N313P from KABUL, arrived in SZYMANY at 21h00 on 22 September 2003
viii. N63MU from KABUL, arrived in SZYMANY at an unrecorded time on 28 July 2005

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[151] See NATO, Security within the North Atlantic Treaty Organisation, 17.09.2002, *supra* note 73; in Enclosure "B" – Basic Principles and Minimum Standards of Security, at p. 6, § 18(a). In NATO terms, the category of security classification attached to the bilateral operations of the HVD Programme is known as "COSMIC TOP SECRET (CTS)", a category for which "unauthorised disclosure would result in exceptionally grave damage" to NATO and / or to participating member States.

[152] The approach of the Polish authorities towards my inquiry is dealt with in further detail below. The official position of the Polish Government remains unchanged since it was announced on 10 December 2005: "The Polish Government strongly denies the speculation occasionally appearing in the media as to the existence of secret prisons on the territory of the Republic of Poland, possibly used for the detention-of-foreigners purposes of interrogation. There are no such prisons in Poland and *ipso facto* no prisoners detained in contravention of the laws and international conventions to which Poland is a party." Most recently it was reproduced in submissions before the United Nations Committee Against Torture (CAT) in Geneva; see Written replies by the Government of Poland to the list of issues (CAT/C/POL/Q/4/Rev.1) to be taken up in connection with the consideration of the fourth periodic report of Poland (CAT/C/67/Add.6), UN Document CAT/C/POL/Q/4/Rev.1/Add.1, 30 March 2007, available at http://www.ohchr.org/english/bodies/cat/cats36.htm; response to Question 12, at page 23, § 72.

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183. My first observation regarding the dates of these flights is that several of them conform closely to the dates on which particular "High-Value Detainees" (HVDs) were transferred to CIA "black sites," particularly in outward movements from Kabul, Afghanistan. The most conspicuous example pertains to the so-called "mastermind" of the 9/11 attacks, Khalid Sheikh Mohamed (KSM), who was captured in Rawalpindi, Pakistan on 1 March 2003[183]. Our insider sources have told that KSM was transferred to a secret CIA facility "within days" of his arrest; and from analysis of materials supporting the 9/11 Commission Report[184], we know that the process of interrogating him commenced shortly afterwards[185], and continued throughout 2003. It is noteworthy that the well-known rendition plane N379P undertook a clandestine flight from Kabul to Szymany on 7 March 2003, less than one week after KSM's arrest. Whilst it is not possible at this stage to state the fact definitively, it is likely that the transfer of KSM and several other HVDs into Poland throughout 2003 took place on the flights uncovered in this report.

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184. The full extent of my proof, however, goes beyond merely the number of confirmed flights into Szymany and their concordance with suspected dates of HVD transfers. Through our careful analysis of hundreds of pages of raw aeronautical "data strings,"[186] we can now demonstrate that in the majority of cases these CIA flights were deliberately disguised so that their actual movements would not be tracked or recorded – either "live" or after the fact – by the supranational air safety agency Eurocontrol. The system of cover-up entailed several different steps involving both American and Polish collaborators.

185. The aviation services provider customarily used by the CIA,[187] Jeppesen International Trip Planning,[188] filed multiple "dummy" flight plans for many of these flights. The "dummy" plans filed by Jeppesen – specifically, for the N379P aircraft – often featured an airport of departure (ADEP) and / or an airport of destination (ADES) that the aircraft never actually intended to visit. If Poland was mentioned at all in these plans, it was usually only by mention of Warsaw as an alternate, or back-up airport, on a route involving Prague or Budapest, for example. Thus the eventual flight paths for N379P registered in Eurocontrol's records were inaccurate and often incoherent, bearing little relation to the actual routes flown and almost never mentioning the name of the Polish airport where the aircraft actually landed – Szymany.

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[183] On the capture of KSM, see *inter alia* B. Raman, "How significant is Khalid Sheikh's arrest?" on Rediff.com, 3.03.2003, available at http://in.rediff.com/news/2003/mar/03raman.htm; and BBC News Online, "Bush hails 'Al-Qaeda killer' arrest," 4.03.2003, available at http://news.bbc.co.uk/2/hi/south_asia/2817411.stm.
[184] The full report and records of the National Commission on Terrorist Attacks upon the United States (the "9/11 Commission") are available online at http://www.9-11commission.gov/. In particular, Chapters 5 and 7 of the Commission Report are said to "rely heavily on information obtained from captured Al-Qaeda members," specifically ten detainees, including Khalid Sheikh Mohamed, "whose custody has been confirmed officially by the US Government." See the inset on "Detainee Interrogation Reports," in Chapter 5, at page 146. For specific dates on which KSM and other "high-value detainees" were interrogated, see, in particular, "Notes to Chapter 5", in Notes to the 9/11 Commission Report, at pages 488 to 499.
[185] Interrogations of KSM are dated as early as 12.04.2003, just over a month after his capture, see "Notes to Chapter 5", 9/11 Commission Report, *ibidem*. Further interrogations are dated at frequent intervals throughout 2003 and 2004.
[186] "Data strings" are exchanges of messages or digital data (mostly in the form of coded text and numbers) between different entities around the world on a network known as the AFTN (Aeronautical Fixed Telecommunication Network). "Data strings" record all communications filed in relation to each particular aircraft as its flights are planned in advance, and as it flies between different international locations. The filings come from diverse entities, including aviation service providers, ANS (Air Navigation Services) authorities, airport authorities and government agencies. I have obtained complete sets of "data strings" for about twenty flight circuits, which I selectively requested from the AFTN system. The selected circuits include each of the circuits featuring undeclared flights of CIA aircraft into Szymany, as well as circuits featuring landings in Romania and a large number of rendition operations pertaining to individual detainees whose cases I dealt with in my report of 2006. Our team has conducted an in-depth analysis of all these "data strings," together with information in the Marty database and in consultation with aviation experts.
[187] Jeppesen International Trip Planning is the travel service of Jeppesen Dataplan, an aviation services provider based in San Jose, California and a subsidiary of Boeing, the world's largest aerospace company. On 30 May 2007, the ACLU announced a lawsuit against Jeppesen Dataplan for its involvement in the renditions of three individuals: Ahmed Agiza, Binyam Mohamed and El-Kassim Britel. See American Civil Liberties Union, "ACLU Sues Boeing Subsidiary for Participation in CIA Torture and Kidnapping," 30 May 2007, available at http://www.aclu.org/safefree/torture/29920prs20070530.html. For the first revelations about Jeppesen's involvement in CIA detainee transfers, including the rendition of Khaled El-Masri, see Jane Mayer, "Outsourcing: The CIA's Travel Agent", in *The New Yorker*, 30.10.2006, available at http://www.newyorker.com/archive/2006/10/30/061030ta_talk_mayer. The Managing Director of Jeppesen is quoted in the article as having said: *"We do all the extraordinary rendition flights – you know, the torture flights. Let's face it, some of these flights do end up that way."*
[188] Communications, notably flight plans, filed by Jeppesen International Trip Planning are identified in the AFTN system by the use of the company's "originator address," which is KSFOXLDI

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186. The Polish Air Navigation Services Agency (*Polska Agencja Żeglugi Powietrznej*), commonly known as PANSA, also played a crucial role in this systematic cover-up. PANSA's Air Traffic Control in Warsaw[189] navigated all of these flights through Polish airspace, exercising control over the aircraft through each of its flight phases[190] right up to the last phase, when control was handed over to the authority supervising the airfield at Szymany,[191] immediately before the aircraft's landing. PANSA navigated the aircraft in the majority of these cases without a legitimate and complete flight plan having been filed for the route flown.

187. Moreover, in certain instances PANSA took on the responsibility of filing the onward flight plan for the next leg of the circuit after Szymany. We know that PANSA filed such flight plans in instances where Szymany had been omitted completely from the original Jeppesen flight plans, and where the aircraft was required to fly onwards from Szymany to a destination outside Poland. Similarly in at least one instance where the aircraft flew onwards from Szymany to Warsaw – and thus did not require initially to leave Polish airspace – PANSA simply navigated the onward flight without a flight plan.

188. It is also noteworthy that Jeppesen appears to have followed PANSA's contributions to these operations very closely, acting upon responses from the flight management system to PANSA's communications within minutes of their being received. Furthermore, both Jeppesen and PANSA have co-ordinated their actions with the in-flight communications from the aircraft's Pilot-in-Command.[192]

189. Accordingly, several circuits we have analysed show the following "sequencing" of flight navigation responsibilities for a typical circuit of N379P involving a landing at Szymany, which demonstrate a calculated cover-up of the aircraft's movements:

- Jeppesen files flight plans for every element of the circuit up to and including N379P's return to Europe from Kabul; typically Jeppesen's flight plan(s) from Kabul onwards reflect fictitious routes, featuring false airports of destination and departure that are registered in the Eurocontrol flight management system;
- N379P's Pilot-in-Command then flies from Kabul into Polish airspace, at which point the Polish authorities (PANSA) take over to navigate the aircraft to a landing at Szymany Airport without a corresponding flight plan, but in conjunction with Polish military authorities in Warsaw and on the ground;
- PANSA also handles onward flight planning for N379P's departure from Szymany, either by navigating the aircraft to a stopover in Warsaw or by filing a flight plan for its next international destination, such as Prague or Larnaca;
- Jeppesen resumes its planning role once N379P has left Szymany, filing flight plans for the remaining elements of the circuit, starting from either Warsaw or the first international airport after Szymany, continuing until the aircraft's return to its base in the United States.

[189] The entire national airspace of Poland comprises one single Flight Information Region (FIR), denoted by the four-letter code EPWW. Poland therefore has only one Area Control Centre (ACC). All air traffic into Poland is controlled by the Polish Air Navigation Services Agency, PANSA, from its Air Traffic Management Centre at Warsaw Airport. For an excellent overview of Polish Air Traffic Control, see PANSA, "Air Traffic Control", available at http://www.ansp.pl/...
[190] We have identified the relevant "data strings" communications about these flights being sent from the AFTN address "EPWAZPZX", which denotes the "Approach Control Centre – Air Traffic Service Reporting Office at Warsaw Airport". In addition to the phase of general "Region Control" for all of Poland, the phase of "Approach control" for Szymany Airport, during which the movements of all civil or military aircraft are controlled within a specified range of the airport, is dealt with from Warsaw. Szymany Airport does not meet the criteria (i.e. passenger airports that maintain fixed flight connections) to have its own Approach Control unit so it relies on the unit at Warsaw Airport.
[191] We have identified the relevant "data strings" communications about these flights being sent to the AFTN address "EPSYYDYX", which denotes the "Authority Supervising the Aerodrome at Szymany Airport". Several airport officials who were present at Szymany Airport when these flights arrived in 2003 have told us that their notification came from military sources in Warsaw and that all arrangements for the landings were handled using special military units on the ground. Polish Air Traffic Control explains these procedures in the following terms: "Military operations carried out in the military aerodrome zones are controlled by a military unit that directly co-operates with the Approach Control." From our Polish insider sources, we know that the Director of Military Operations, working with PANSA Approach Control in Warsaw, as well as key officials in the Border Guards who notified Szymany of the landings, and military officers who took over from civilian officials at Szymany to deal with them on the ground, were working on behalf of Polish military intelligence in collaboration with the CIA.
[192] We have been able to establish through our investigations that the men registered as Pilot-in-Command (PIC) for the undeclared flights into Szymany are established CIA pilots. We have records of their full names and have been able similarly to vouch for their engagement as pilots in multiple detainee transfer operations involving other countries. We have also confirmed their appearances on flight manifests with known CIA "rendition teams" by referring to documents provided to us confidentially from an ongoing judicial inquiry in a Council of Europe member State.

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190. The analysis of "data strings" has also enabled me to confirm further intricate details of the "anatomy" of these CIA clandestine operations. For example, each of these flights was operated under a "special status" or STS designation.[169] The aircraft were thereby exempted from adhering to the normal rules of air traffic flow management (ATFM), and did not, for example, have to wait at airports for approved departure slots. Since such exemptions are only granted when "specifically authorised by the relevant national authority,"[170] they provide further evidence of Polish complicity in the operations. The clearest proof of Poland's knowledge and authorisation of such landings is demonstrated by the following two-line message, contained in several "data strings" for flights of N379P in 2003:

> **"STS/ATFM EXEMPT APPROVED**
> *POLAND LANDING APPROVED"*

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191. "Data strings" have also enabled us to trace the official overflight and landing permits obtained from various other countries for these flights; the times and "waypoints" at which the aircraft entered or departed the national airspace of each country; and the actual routes flown between Szymany and other points on the "global spider's web". I have used all of this information to create the graphic representations of "Disguised CIA flights into Szymany Airport, Poland,"[171] which accompany this report as an appendix.

192. In concluding this section it is only fitting that I should note here, with considerable regret, that the cover-up of CIA flights into Szymany seems to have carried over into the approach adopted by the Polish authorities towards my inquiry on the specific question of national aviation records. In over eighteen months of correspondence, Poland has failed to furnish my inquiry with any data from its own records confirming CIA-connected flights into its airspace or airports. The excuses from the Polish authorities for having failed to do so unfortunately do not seem to be credible.

193. In my report of 2006, I commented that the absence of flight records from Poland was "unusual,"[172] to say the least. Mr Karol Karski, Chairperson of the Polish Delegation to PACE, suggested that I "did not use the information received from Poland honestly"[173] and stated, in his subsequent correspondence, that he hoped to "answer [my] request exhaustively" having "addressed one more time the relevant Polish authorities and asked for proper information". He then repeated a familiar undertaking:

> "I would like to assure you that I will transmit to you the complete data as soon as I will be provided with it."[174]

[169] The status of the flight goes to the all-important question as to whether the function it is performing is considered to be "state," "civilian" or "military." These undeclared flights into Szymany, which we understand to have been operated as "military flights", eased their passage into Poland by securing exemptions as "special states", or STS, flights. STS designators are very strictly limited, because once granted they allow deviations from planned routes and other important exemptions. See Eurocontrol, User Relations and Development Bureau, *IFPS Users Manual*, Edition No. 11.2, 30.03.2007 (hereinafter "Eurocontrol IFPS Users Manual"), available at http://www.ctmu.eurocontrol.int; at Section 60, "Special Status Flights (STS)", p. 60-1

[170] The particular STS indicator used by flights into Szymany was "AFTMEXEMPTAPPROVED". According to Eurocontrol: "*This exemption designator shall only be used with the proper authority. Any wrongful use of this designator to avoid flow restriction shall be regarded by the relevant states as a serious breach of procedure and shall be dealt with accordingly.*" See Eurocontrol IFPS Users Manual, *ibidem*, at Section 54, "STS/AFTMEXEMPTAPPROVED Indicator", p. 54-1.

[171] See Appendix No 1 to the present report, entitled "Disguised CIA flights into Szymany Airport, Poland."

[172] Sixth Marty Report 2006, Council of Europe Doc. 10957, *supra* note 6, at section 2.8.2, "The case of Poland", §§ 63 to 78, pages 20 to 21.

[173] Contribution of Mr Karel Karski, Chairperson of the Delegation of Poland to PACE, at the 17th Sitting of the Plenary of the Parliamentary Assembly during its 2006 Session, Strasbourg, 27.09.2006.

[174] Letter to me from Mr Karel Karski, Chairperson of the Polish Delegation to PACE, 28.12.2006.

194. After several further months passed,[175] Mr Karski ultimately responded with the following three items of information:[176]

- "the Polish Government has definitively closed the investigation into alleged secret CIA prisons and in this connection, once again explicitly denies all speculations appearing in the media";
- "the European Parliament's Temporary [TDIP] Committee... has all the information available to the Polish side, concerning the aircraft listed in [your] letter"; and
- "the registers of flight movements over the territory of Poland in 2001 to 2005 are in Eurocontrol databases."

195. This response of the Polish authorities is patently unsatisfactory. The third item of information is belied by the findings I have presented above, along with the accompanying graphic and data in the annex. Meanwhile the second statement suggests that the Polish Government is attempting to deceive both the CoE and the European Parliament by playing the institutions off against one another.[177]

196. On the whole, Mr Karski's response casts the Polish authorities in a negative light, whichever one of two possible conclusions I might choose to draw. Is the Polish Government unable to lay its hands on official data from Polish sources, which our team successfully uncovered and which at least one airport official is publicly known[178] to possess? Or have the Polish authorities wilfully withheld valuable information from my inquiry? I strongly hope that the Polish authorities now take the situation in hand and retrace fully the unfolding of this situation and establish respective responsibilities.

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a. *Transfer of HVDs into CIA detention in Poland*

197. Our enquiry regarding Poland included talks with Polish airport employees, civil servants, security guards, Border Guards and military intelligence officials who told first-hand knowledge of one or more of the undeclared flights into Szymany. Their testimonies are crucial in establishing what happened in the hour after these CIA-associated aircraft landed at Szymany. The following account is a compilation of testimonies from our confidential sources about these events.

b. *Arrivals and "drop-offs" at Szymany Airport*

- Each of these landings was preceded, usually less than 12 hours in advance, by a telephone call to Szymany Airport from the Warsaw HQ of the Border Guards (*Straży Granicznej*), or a military intelligence official, informing the Director Mr Jerzy Koś of an arriving "American aircraft"
- The airport manager, who assumed the flights were coming from the United States, was instructed to adhere to "strict protocols" to prepare for the flights, including: clearing the runways of all other aircraft and vehicles; and making sure that all Polish staff were brought in to the terminal building from the vicinity of the runway, including local security officials and airport employees
- The perimeter and grounds of the airport were secured by military officers and Border Guards, the latter of whom were registered on a roll-call document that lists names of those present on more than five dates between 2002 and 2005
- American officials from the nearby Stare Kiejkuty intelligence training base assumed "control" on the dates in question, arriving in several passenger vans in advance of the landing; "everything Americans," said one Polish source present for several landings, "even the drivers [of the vans] were Americans."
- A "landing team" comprising American officials waited at the edge of the runway, in two or three vans with their engines often running; the aircraft touched down in Szymany and taxied to a halt at

[175] On 14.02.2007, I sent a reminder letter to Mr Karski on this issue, concluding: "*I respectfully urge you to re-emphasise to the Polish authorities the importance of sending me a swift and comprehensive reply to my letter, along with the requested data.*"

[176] Letter to me from Mr Karel Karski, Chairperson of the Polish Delegation to PACE, 26.03.2007.

[177] When I read that "*all the information on the Polish side*" had been given to the EP's TDIP Committee, I recalled the resolution adopted on 12.02.2007 by the very same Committee, in which it regrets that "*contradictory statements were made about the flight plans for these CIA flights, which were first said not to have been retained, then said probably to have been archived at the airport, and finally claimed to have been sent by the Polish Government to the Council of Europe.*" See European Parliament Resolution on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (AS-0030/2007 – Rapporteur: Giusepe Claudio Fava), 12.02.2007, at § 172. It is scarcely credible for the Polish Government to practice such evasion towards me and my fellow Parliamentarians.

[178] See Tom Hundley, "Remote Polish airstrip holds clues to secret CIA flights," *Chicago Tribune*, 6.02.2007, available at http://www.chicagotribune.com/news/nationworld/ct-0702060167feb06,1,1998706.story The article says: "Jarosław Jurczewski, the airport's director, denied that flight records had ever been lost for the mysterious landings and provided the Tribune with documentation for seven of the flights in question."

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the far end of the runway, several hundred metres (and out of visible range) from the four-storey terminal control tower

- The vans drove out to the far end of the runway and parked at close proximity to the aircraft; officials from within the vans were said to have boarded the aircraft "every time", although it is not clear whether any then stayed on board
- All the officers charged with "processing" the passengers on these aircraft were Americans; no Polish eye-witness has yet come forward to state whether or not any detainees disembarked the aircraft upon any of these landings – indeed, it may be that no Polish eye-witness to such an event exists
- However, asked where the HVDs actually entered Poland, one of our sources in Polish military intelligence confirmed that "it was on the runway of Szczytno-Szymany"; another said "they come on planes and they entered at this airport"
- Documentation, in Polish, attests to persons having been "picked up" [verbal translation] at Szczytno-Szymany in conjunction with at least two aircraft landings in 2003; the documentation also refers to the dispatch of vehicles to the airport from the military unit stationed at the Stare Kiejkuty facility
- Having spent only a short time next to the aircraft after each landing, the vans then drove back past the side of the terminal building, without stopping, before leaving airport premises through the front security gate; the vans put their headlights up to full level and airport officials say they "turned our eyes away"
- The vans then drove less than two kilometres along a simple tarmac road, lined by thick pine forest on both sides, through an area which was entirely out of bounds to private or commercial vehicles during these procedures, having been cordoned off for "military operations"; at the end of the tarmac road, the vans travelled north-east beyond Szczytno for approximately 15 to 20 minutes before joining an unpaved access road next to a lake;[173]
- at the end of this access road they reached an entrance of the Stare Kiejkuty Intelligence training base, where multiple sources have confirmed to me that the CIA held High-Value Detainees (HVDs) in Poland.

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c. *Secret detention operations at Stare Kiejkuty*

198. The stringent limitations on information about what happened to detainees "dropped-off" at Szymany are perhaps the best example of the "need-to-know" principle of secrecy in practice. Polish officials were not involved in the interrogations or transfers of HVDs, nor did they have personal contact. In explaining his understanding of HVD treatment or conditions in detention, one Polish source said:

> "I have no understanding of detainee treatment. We were not "treating" the detainees. Those were the responsibilities of the Americans."

199. We were told that senior Polish military intelligence officials who visited Stare Kiejkuty were ordered to "limit rotation and operational demands on Polish officers to make the HVD programme work." Beyond this fleeting insight, however, neither Polish nor American sources who discussed the HVD programme with us would agree to speak about the exact "operational details" of secret detentions at Stare Kiejkuty, nor would they confirm how long it was operated for, which other facilities were used as part of the same programme in Poland, nor how and when exactly the detainees left the country.

[173] A member of our team re-traced the route from Szymany Airport to the Stare Kiejkuty intelligence training base.

200. The legacy of the HVD programme in Poland is palpable in the self-perceptions of those Polish officials who participated in its operations. The members of military intelligence with whom we spoke seemed, on one level, to be in denial as to whether secret detentions in violation of Poland's human rights obligations had taken place in their country; yet, on another level, they showed signs of resentment mainly that their American allies had betrayed their bond of trust by leaking details of the programme. These contradictory sentiments, often difficult to gauge accurately, are aptly captured by the following statement:

> "*The [Stare Kiejkuty] base was America's choice; our job was their security. If any American is here, it is America's responsibility, but he also becomes Poland's responsibility too. So it is my responsibility* "

IV. Secret detention operations in Romania

I. Partnering with military intelligence in Romania

201. In Romania, after the December 1989 Revolution and the dismantling of the repressive *Securitate* in 1990, the reforms of the intelligence services were focussed, understandably, on preventing the politicisation and abuse of internal state security structures. Similarly, much of the subsequent discussion around democratic oversight in the country has looked at ways of controlling "institutional actors and leading political figures with authority over the security and intelligence domain who disregard the legal stipulations regarding political neutrality."[174]

202. As I have analysed Romania's complex array of different agencies and sub-structures that collect intelligence for the state,[175] I have realised that preserving political neutrality is merely one of a variety of competing considerations that affect the objectivity and effectiveness of their accountability structures.[176] In the context of my inquiry, it seems to me that while Romania has made at least superficial efforts to rid its civilian intelligence services of the scourges of their *Securitate* past, its oversight mechanisms do not go far enough to prevent the exercise of what could be called "unitary executive authority" – on the part of the President – over military intelligence services and the wider defence community.

203. This analysis conforms to the testimony of our Romanian sources, who said that the Americans chose to work with the military intelligence services because the military "cover" afforded the CIA flexible deployment options and guarantees of secrecy under the NATO framework. As the following comparison shows, there are substantial disparities between the respective monitoring mechanisms in the civilian and military spheres.

[174] See Larry Watts, Office of the National Security Advisor of the Romanian President, "Control and Oversight of Security Intelligence in Romania", Working Paper No. 111, published by the Geneva Centre for the Democratic Control of Armed Forces (DCAF), Geneva, February 2003, copy on file with the Rapporteur (hereinafter "Watts, Oversight of Security Intelligence in Romania"), at p. 27. The author recommends that "real sanctions should be introduced and enforced" in such instances where rule of law is subverted by political considerations.

[175] There are at least six different secret services in Romania, several of them housed under individual Government Ministries. The agencies that I have not discussed specifically in this section include the General Directorate of Intelligence and Internal Protection (*Direcția Generală de Informații și de Protecție Internă*, or *DGIPI*) in the Ministry of the Interior, and the Independent Protection and Anti-Corruption Agency (*Serviciul Independent de Protecție și Anticorupție*, or *SIPA*) in the Ministry of Justice.

[176] For a much more developed discussion of the relevant considerations, see: European Commission for Democracy through Law (Venice Commission), "Report on the Democratic Oversight of the Security Services", Study No. 388/2006, CDL-DEM(2007)001, 24.06.2007. In its concluding remarks, the Commission highlights "recurring issues in the design of oversight procedures", as follows: "First is the need to establish mechanisms to prevent political abuse while providing for effective governance of the agencies. Overall, the objective is that security and intelligence agencies should be insulated from political abuse without being isolated from executive governance;" and "the challenge for oversight and accountability is to adapt or devise processes that simultaneously command democratic respect while protecting national security;" at pp. 48-50, § 215 to 228. (Soon to be issued as CDL-AD(2007)016 – to be made available on http://venice.coe.int.

204. First, in the civilian sphere, Romania's two main agencies of the post-Communist era, the Romanian [Domestic] Intelligence Service (*Serviciul roman de informatii, or SRI*) and the Foreign Intelligence Service (*Serviciul de informatii externe, or SIE*) were created under specific laws[177] and a multi-layered oversight structure, which purport to immunise them from manipulation along party-political lines. The SRI and the SIE operate independently of Government and are *not* subordinated to the incumbent executive. They are each subjected to parliamentary scrutiny through dedicated Special Parliamentary Committees.[178] The Supreme Council of National Defence (*Consiliul Suprem de Aparare a Tarii, or CSAT*), an autonomous administrative body chaired by the non-partisan Office of the President,[179] organises and continually monitors the activities of the SRI and the SIE, in line with its mandate to co-ordinate the overall national security and defence of the country. As such, the possibilities for a handful of people at the heart of Government to use the SRI or the SIE to pursue their own personal, political or strategic agenda are exceedingly narrow.

205. In contrast, intelligence gathering in the military sphere is a competence formally overseen by the Ministry of National Defence,[180] through its **General Directorate for Defence Intelligence** (*Directia Generala de Informatii a Apararei, or DGIA*). What little parliamentary scrutiny of defence intelligence is supposed to exist[181] certainly does not apply to its organisational, planning or operational aspects. On the contrary, strict compatibility with NATO structures, insisted upon as a criteria for NATO accession, means that the majority of Romanian military intelligence activities are kept secret from all but those who "need to know".

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206. According to our sources, the relevant sub-unit of the DGIA that worked with the CIA on its clandestine operations was the **Directorate for Military Intelligence and Representation** (*Directia Informatii si Reprezentare Militara, or DIRM*), also known as the "J2" Unit. This unit was not involved in transporting, holding or interrogating any detainees – since these were tasks performed solely by the Americans – but, according to one Romanian officer, the "J2" officers "co-operated and adjusted" to accommodate the CIA personnel's needs.

207. As part of a wider restructuring of the DGIA in 2003,[182] the "J2" unit increased in scope and importance at a very strategic moment in Romania's co-operation with the United States, just as American forces were deploying into the country in large numbers to launch their aerial missions into Iraq for Operation Iraqi Freedom.[183] The place at which these US forces were stationed, the 86th Air Force Base at Mihail Kogalniceanu Airfield,[184] became the most significant point in this country for a whole range of collaborative activities in a "partnership" between Romanian and American personnel.

[177] For the SRI, see the *Law on the Organisation and Functioning of the Romanian Intelligence Service (SRI)*, Law No. 14/1992; for the SIE, see the *Law on the Organisation and Functioning of the Foreign Intelligence Service (SIE)*, Law No. 1/1998.

[178] For the SRI, see the *Decision of the Romanian Parliament on the Organisation and Functioning of the Joint Committee of the Senate and the Chamber of Deputies for Parliamentary Oversight of the Romanian Intelligence Service (SRI)*, Decision No. 30/1993; for the SIE, see the *Decision of the Romanian Parliament on the Organisation and Functioning of the Special Committee for Parliamentary Oversight of the Foreign Intelligence Service (SIE)*, Decision No. 44/1998. Indeed, some commentators say that the increased transparency and growing public trust in the SRI and the SIE owe largely to the strength of these parliamentary accountability mechanisms. See, for example, Watts, Oversight of Security Intelligence in Romania, *Ibidem*: "Romania's semi-presidential system has proven itself capable of blocking the over-accumulation and over-centralisation of power by government executives."

[179] In addition to the President (Chair), the membership of the CSAT includes: the Prime Minister (Vice-Chair); the Ministers of Defence, Economy and Commerce, Finance, Justice, Interior and Administrative Reform, and Foreign Affairs; the Directors of the SRI and SIE; the Presidential Adviser on National Security; and the Chief of General Staff; see the CSAT website at: http://csat.presidency.ro/. The CSAT is regulated under a 2002 statute - Law No. 415/2002 – and its activities are themselves reported regularly to the Parliamentary Committee for Defence, Public Order and Security. For further discussion on related matters, see also Karoly Szabo, "Parliamentary Overview of Intelligence Services in Romania," workshop paper published by the Geneva Centre for the Democratic Control of Armed Forces (DCAF), delivered at the workshop on "Democratic and Parliamentary Oversight of Intelligence Services", Geneva, 3-5.10 2002, copy on file with the Rapporteur.

[180] The Ministry of National Defence (*Ministerul Apararii Nationale*) was renamed as the Ministry of Defence (*Ministerul Apararii*) in April 2007. I have used its old name, which applied in the period in question.

[181] Formally speaking, military intelligence activities are supposed to be subject to the same parliamentary scrutiny as all the activities of the Ministry of National Defence, namely through the Committees on Defence, Public Order and National Security in both the Senate and the Chamber of Deputies of the Romanian Parliament. In reality, these Committees are far removed from the actual work of the *DGIA* services.

[182] See, for example, Daru Dragomir, "Hurricane in the Army's Secret Services", Bucharest Zua, 9.04.2003, at p. 8; available online at http://www.zua.net/.

[183] Between February and June 2003, United States Armed Forces (both airforce and ground troops) deployed an expeditionary group for operations in Iraq at the 86th Air Force Base – Mihail Kogalniceanu Airfield ("MK Airfield"), near Constanta, Romania. According to Romanian military personnel at the airfield, the deployment reached up to "6,000 bodies" at its peak, albeit that most of the troops were only there temporarily, or in transit. MK Airfield was used for the purpose of "regrouping and resupplying air deployments before entering action in theatre in Iraq."

[184] At the time of Operation Iraqi Freedom, and up until 27.04.2004, MK stood on its own as the 57th Air Force Base of the Romanian Air Force. From 1.05.2004, the self-standing air force base at MK was "disbanded" and Romanian military air traffic

208. A noteworthy aspect of this partnership was that everything was carried out under the NATO framework. The deployment at MK Airfield in February 2003 was authorised in a Memorandum of Understanding signed by President Ion Iliescu in late 2002, in which the terms of NATO-SOFA and the bilateral SOFA-Supplemental were expressly referenced. "NATO concepts" were applied to the deployment, including MK's designation as an APOD / APOE,[185] and the phase being referred to as "regrouping." Most important of all, a Joint Operations Centre was established in which American and Romanian personnel "from each and every branch" of their respective armed forces and services worked together side-by-side throughout the Operation, sharing operational knowledge in strict accordance with the NATO Security Policy.

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209. Members of the Directorate for Military Intelligence, the "J2" Unit, participated in the Joint Operations Centre,[186] which – as our American sources confirmed – also received "visits"[187] from operatives of the CIA's Counterterrorist Centre (CTC) between February and June 2003. While the whole four-month period of Operation Iraqi Freedom at MK Airfield was characterised as "a military activity in support of a military operation," the relationships formed and strengthened between members of the respective intelligence services – both individually and collectively – were just as indispensable in the broader context of the "war on terror."[188] The Operation was construed as a welcome "dry-run" for Romania in NATO and for potential future bilateral actions between the partners.

210. Continuity in the evolving relationship between American and Romanian services can perhaps best be illustrated by highlighting the role of the then Head of the Directorate of Military Intelligence and Representation (*Sef al Directiei de Informatii si Reprezentare Militara*), **Sergiu Tudor Medar**. General-Lieutenant Medar served in the United States for seven years in the 1990s, heading the Office of the Romanian Defense Attache in Washington, DC until 1999. Between 2000 and 2003 he headed the original incarnation of the Directorate of Military Intelligence in the DGIA; then from 2003 until the end of 2005 he was Head of the restructured "J2" Unit. General-Lieutenant Medar was a prescient choice for the CIA as a liaison for secret detention operations in Romania: not only was he trusted beyond doubt in both US and NATO military circles; he was also, as the following quote attests, aware of the potential perils of partnering with military intelligence to achieve an essentially political goal:

> "The civilian leadership's tendency in using its control over intelligence for political purposes is likely to be even bigger than its desire to keep the military component under its firm control. Some equilibrium must be established between the professional experience of the Military Intelligence Service and the authority of the civilian political leadership."[189]

reduced significantly, as part of wider restructuring in the Ministry of National Defence. The MK Airfield is therefore now administered from Fetesti as an extension of the 86th Air Force Base; the only active unit located at MK is the 863 Helicopter Squadron.

[185] APOD stands for Aerial Port of Debarkation; APOE stands for Aerial Port of Embarkation. Under NATO concepts these references mean that MK Airfield was hosting primarily transport aircraft that were bringing in and shipping out personnel and equipment.

[186] Confirmed in interviews by the Rapporteur's representative with Romanian military personnel stationed at MK Airfield. Military intelligence was the second of nine categories of military staff that participated in the Joint Operations Centre. The other categories were: personnel, operations, logistics, planning, communications, training, finance and budget, and "cimic" – or civil-military co-operation.

[187] Visits by US official's to Romanian facilities in the context of their classified bilateral arrangements are regulated under the NATO framework and the *Agreement on the protection of military classified information* of 21 June 1995 (entered into force in 2003). See "Answers of the Romanian Delegation to the Questionnaire on the Alleged Secret Detention Centres", appended to the letter to me from Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, 20 January 2006; at page 1. Article 6(1) of the 1995 Agreement states as follows: "The authorisation for "visits" by one party to units or installations of the other party where access to state classified military information is necessary, will be limited to official purposes... [and] to government officials both parties have agreed upon."

[188] One example of how Romanian military intelligence continued to collaborate with the United States in the "war on terror" was Parliament's endorsement in March 2004 of President Iliescu's proposals to send a special military intelligence detachment of 30 officers to serve in the International Security Assistance Force (ISAF) in Afghanistan. See Rompres News Agency, Bucharest, "Parliament approves Romanian military intelligence unit for Afghanistan," reproduced on BBC Monitoring, 2.03.2004, available at
http://www.[illegible]/international_media/2004/march/02/BBC_Monitoring_20_03_2004_Parliament%20approv[illegible]%20Romanian%20military%20intelligence%20unit%20for%20Afghanistan.htm.

[189] See Sergiu Medar, "The role of military intelligence in the process of military and political-military decision-making" (original in Romanian), internal document of the Directorate for Military Intelligence, Bucharest, 2000; cited in Florin Ureche, "Civilian Control over Military Intelligence Services", in *Romanian Military Thinking*, April 2006, pp. 63-74, copy on file with the Rapporteur; at p. 69.

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223. Nonetheless we were able to confirm the approximate borderlines of the CIA's "outer perimeter" for its secure area in Romania. We were assisted by a source in military intelligence, a detailed map and an annex to the Access Agreement of 2005, in which reference is made to "facilities"[100] generally and to one relevant "manoeuvre area" in particular.[101] Our source used his right index finger to draw an invisible elliptical perimeter on the map, which encompassed a vertical column between the towns of Tulcea (to the north) and Constanta (to the south), as well as an area extending approximately 50 kilometers inland (to the west) and in the opposite direction to the Black Sea coast (to the east).[102] Referring to the role of the Romanian "J2" Unit in supporting bilateral arrangements with the CIA, our source said: *"We have to seal [this] entire area and limit access there."*

224. The secure area in question includes several current and former military installations, including all of those facilities named in the Access Agreement of 2005, which have been used by the United States under a "special regime of access" since late 2001.[103] Nonetheless, the main reason that led one of our CIA sources to say that his "guys were familiar with the area" was its inclusion of the landing point at which scores of civil and military flights carrying American service personnel have landed throughout the "war on terror": Mihail Kogalniceanu Airfield.

225. In the light of all that I have said above about MK Airfield, I only wish to draw attention to one further factor that has made it a venue so conducive to "partnership" with the CIA: its "dual" military-civilian character.[104] Military personnel worked routinely with civilian Air Traffic Controllers in processing both civil and military flights at the Airfield – each according to the applicable aviation rules. The system used at MK Airfield bears great similarities, albeit on a much smaller scale, to the system used at Kabul Airport (OAKB),[105] which became such a hub in the context of coalition military activities in Afghanistan and simultaneously a destination or departure point for multiple known renditions of CIA detainees on board civilian aircraft since the start of the "war on terror".

226. During the period of interest to my inquiry – from 2002 until 2005 – the civilian section of the MK Airfield had a Director General with a formidable "dual" civil-military character of his own. Rtd. Colonel Mircea Dionisie was a former controlling Commander of the military Air Force Base at MK Airfield in the communist pre-1989 era. He returned to the Airfield in 2002 and became the Director General of the civilian airport, now known as *Aeroportul International Mihail Kogalniceanu Constanta* (AIMKC).[106] Rtd. Colonel Dionisie stayed in this position until 12 July 2005 and therefore oversaw the bulk of the flights into and out of the MK Airfield, the exact movements of which – as well as their connections to CIA detainee transfers – my inquiry has attempted to trace.

[100] The four named facilities are as follows: Smardan Training Range; Babadag Training Area and Rail Head; Mihail Kogalniceanu Air Base, co-located with 34th Mechanized Brigade Base; and Cincu Training Range.

[101] See "Annex A – Facilities", the first of two annexes to the Access Agreement between Romania and the United States, 6.12.2005, at p. 9. Under the last of the four named facilities, Cincu Training Range, the "manoeuvre area" is described as follows: "comprised of areas in Tulcea and Constanta counties ("Judetul" in Romanian), bounded generally by the towns of Babadag in the north, Babadag Training Area in the east, Tariverde in the south and Horia in the west."

[102] In total, the perimeter line encompasses an area of about 1,500 square kilometers of territory in south-eastern Romania. See Appendix No. 2 to the present report, entitled "The 'secure zone' for CIA transfers and detentions in Romania."

[103] See the discussion on bilateral NATO SOFA arrangements between Romania and the United States earlier in this report, at section II.iii.b, entitled "Application of the NATO framework in Romania."

[104] The "dual use" character of MK Airfield dates back to 1991, when the Romanian Ministry of National Defence handed over the following elements of the airfield to the civilian authorities of Constanta International Airport: the runway / landing strip; the "parking apron" for both light and heavy aircraft; the terminal buildings, including the Air Traffic Control Tower; and the main entrance / exit points from the adjacent highway. This restructuring created two "sections" on the MK Airfield: a civilian section and a military section. According to our discussions with Romanian military personnel stationed at the MK Airfield, the civilian and military sections keep one another informed only "for operational reasons [e.g. use of the runway] and on a need-to-know basis." These personnel told us that "*everybody plays by the rules, and that is one of the main reasons for the military side's close co-operation with the civilian side.*"

[105] It is a little known fact that Romanian personnel managed and operated Kabul Airport as one of their tasks in the context of their NATO deployment, 2004 to 2008. Our team spoke with a senior military officer who was seconded directly from MK Airfield to serve for several months at OAKB.

[106] Denoted by the ICAO code "LRCK". *Aeroportul International Mihail Kogalniceanu Constanta* (AIMKC) is the new name of the airport. It was previously called simply *Aeroportul International Constanta* (AIC), but – according to its current Director General – took on the additional MK in its name in order to benefit from the "free publicity" generated by the media scandal over CIA flights allegedly having landed at MK Airfield. Mihail Kogalniceanu was the first President of Romania and – in addition to the MK Airfield – also gave his name to a town about 50 kilometres north of Constanta. Romanians tell me it was the first town in the country to have an entirely Roma population.

b. Transfer of detainees into Romania: the cover-up persists

227. Our efforts to obtain accurate actual flight records pertaining to the movements of aircraft associated with the CIA in Romania were characterised by obfuscation, inconsistency and genuine confusion. I must begin this assessment, however, by commending my colleagues and their assistant in the Romanian Delegation to PACE and, in particular, its Chairperson Gyorgy Frunda, for demonstrating exceptional good faith and professionalism, and for extending the very best of co-operation and assistance to my inquiry. It is unfortunate that the Romanian authorities more generally did not match the levels of thoroughness and transparency shown by this Delegation.

228. Specifically I hold three principal concerns with the approach of the Romanian authorities towards the repeated allegations of secret detentions in Romania, and towards my inquiry in particular. In summary, my concerns are: far-reaching and unexplained inconsistencies in Romanian flight and airport data; the responsive and defensive posturing of the national parliamentary inquiry, which stopped short of genuine inquisitiveness; and the insistence of Romania on a position of sweeping, categorical denial of all the allegations, in the process overlooking extensive evidence to the contrary from valuable and credible sources.

229. First I was confounded by the clear inconsistencies in the flight data provided to my inquiry from multiple different Romanian sources. In my analysis I have considered data submitted directly from the Romanian Civil Aeronautical Authority (RCAA),[107] data provided by the Romanian Senate Committee,[108] and data gathered independently by our team in the course of its investigations. I have compared the data from these Romanian sources with the records maintained by Eurocontrol, comprehensive aeronautical "data strings" generated by the international flight planning system, and my complete Marty Database. The disagreement between these sources is too fundamental and widespread[109] to be explained away by simple administrative glitches, or even by in-flight changes of destination by Pilots-in-Command, which were communicated to one authority but not to another. There presently exists no truthful account of detainee transfer flights into Romania, and the reason for this situation is that the Romanian authorities probably do not want the truth to come out.

[107] See, for example, *Information from the records of the Romanian Civil Aeronautic Authority (RCAA) and the Romanian Ministry of National Defense*, contained as Appendices to the letters sent to me by Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, *dated* 24.02.2007 and 7.04.2006.

[108] The committee to which I refer is the "Senate Committee of Inquiry to investigate the allegations regarding the use of Romanian territory for CIA detention facilities or flights by CIA-chartered aircraft", established under Article 1 of Decision No. 28 of the Senate, Parliament of Romania, 21.12.2006 (hereinafter referred to as the "Senate Inquiry Committee"). The Chairperson of the Committee was Senator Norica Nicolai, supported by Vice-Chair George Cristian Maior and Secretary Ilie Petrescu. The Committee released its final report on 8.03.2007 (hereinafter "Senate Inquiry Committee Final Report, 8.03.2007" – page numbers refer to the original, Romanian version), a copy of which was submitted as an attachment to Senator Nicolai's letter to me dated 20.03.2007. My inquiry was also provided with copies of most of the annexes to the final report, including substantial information from airport authorities, handling service providers and the national Air Traffic Services Administration (ROMATSA). I am grateful to Senator Nicolai for facilitating access for my inquiry to important information in Romania.

[109] In my letters to the Romanian authorities, I highlighted crucial inconsistencies in flight data relating to the movements of a host of CIA-linked aircraft in Romania, including N313P, N379P and N44VM. The documentation I received back from the Senate Inquiry Committee helps to establish certain landings, but is not authoritative enough to date categorically the exact paths flown by these aircraft, nor the full list of sojourns in Romania at which they did or did not land. I cannot, for example, content myself with "evidence" that aircraft changed their routes or destinations based on hand-written annotations on flight plans. In several cases I have "data strings" attaching to communications relating to these aircraft that do not correspond with the Senate Inquiry Committee's version of events.

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230. I found it especially disappointing that the Senate Inquiry Committee chose to interpret its mandate in the rather restrictive terms of defending Romania against what it called "serious accusations against our country, based solely on 'indications', 'opinions', 'probabilities', 'extrapolations' [and] 'logical deductions'."[200] In particular, the Committee's conclusions are not framed as coherent findings based on objective fact-finding, but rather as "clear responses to the specific questions raised by Mr Dick Marty,"[201] referring to both my 2006 report and subsequent correspondence. Accordingly the categorical nature of the Committee's "General Conclusions,"[202] "Conclusions based on field investigations and site visits"[203] and "Final Conclusions"[204] cannot be sustained. The Committee's work can thus be seen as an exercise in denial and rebuttal, without impartial consideration of the evidence. Particularly in the light of the material and testimony I have received from sources in Romania, the Committee does not appear to have engaged in a credible and comprehensive inquiry.

231. The Romanian national delegation to PACE, in their carefully worded reply, ruled out the existence of unlawful CIA activity,[205] and appeared to offer prospects of constructive and transparent co-operation in the search for the truth. However the Romanian Government and Parliament have preferred to keep control of information by directing everything through the Senate Committee,[206] and ultimately reverted to their initial position of complete denial.[207]

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[200] See Senate Inquiry Committee Final Report, 6.03.2007, supra note 200, at Chapter 2, "References to Romania", page 5.

[201] See Senate Inquiry Committee Final Report, 6.03.2007, supra note 200; generally at Chapter 6, "Conclusions reached by the Committee based on its documentation and monitoring activities"; and specifically at pages 10, 11, 12 and 13.

[202] By way of example, the first general conclusion states categorically: "Neither the Romanian Civil Aeronautic Authority nor any other institutions or structures of state with relevant competences in the field investigated by the Committee has any knowledge about certain aircraft operated or chartered by the CIA or by any other company on behalf of the CIA, landing or flying over national territory,' *Ibidem*, at page 10.

[203] The Committee rules out embarkation or disembarkation of any passengers on the key flights listed in the Marty Report of 2006, and states that aircraft associated with the CIA landed only in Bucharest. With regard to MK Airfield, the Committee "concludes that there is no facility that could have been used for the purpose of detention, not even on an ad-hoc basis. Moreover, none of the flights considered suspicious by the Marty inquiry, by NGOs or by the media has ever landed at this airport;" *Ibidem*, at page 11. Among other evidence, our team obtained records of actual flights into MK Airfield by aircraft associated with the CIA, which directly contradicts the Committee's claim.

[204] Final Conclusion No. 5 states as follows: "On the question of whether certain Romanian institutions could have participated knowingly or participated through omission or negligence in unlawful detainee transfer operations in Romanian airspace or at Romanian airports, the Committee's response is negative;" *Ibidem*, at page 14. It should be noted that other final conclusions are not so categorical, however, particularly with regard to whether secret detention facilities could have existed in locations other than the grounds or immediate vicinity of the named airports.

[205] See *inter alia* "Answers of the Romanian Delegation to the Questionnaire on the Alleged Secret Detention Centres", appended to the letter from Gyorgy Frunda, Chairperson of the Romanian Delegation to PACE, to Dick Marty, 20.01.2006; pp. 5 to 6. The language of such submissions was carefully worded so as not to exclude the types of CIA operations I have described in this report: "*No Romanian authority has any knowledge or information about any aircraft illegally transporting prisoners. No Romanian authority has been, legally or illegally, involved in secret transportation of prisoners. The Romanian Government has never issued any authorisation for any transport of prisoners via Romania.*"

[206] In two written decisions, on 14 and 21.11.2006, the Romanian Senate rejected the requests of the Romanian Delegation to PACE to respond to my correspondence directly, and instead assigned to the Senate Committee the sole authority for preparing Romania's official responses. These decisions were followed by a four-month period during which we received no communications, ended only by Senator Nicolaï's submission of the Final Report by letter dated 20.05.2007.

[207] At the end of my inquiry, the official position of Romania has developed no further than the original denials it adopted at the beginning. See "Response of the Romanian Government on the investigation initiated by the Secretary General of the Council of Europe, in accordance with Article 52 ECHR", appended to the letter from Mihai-Razvan Ungureanu, Romanian Minister of Foreign Affairs, to Terry Davis, 15.02.2006; at page 4: "*no public official or other person acting in an official capacity has been involved in any manner in the unacknowledged deprivation of liberty of any individual, or transport of any individual while so deprived of their liberty. Official investigations have been conducted by several Government authorities [whose] results confirmed that no such activities took place on Romanian territory.*"

V. Human rights abuses involved in the CIA secret detention programme

I. Re-humanising the people held in secret detention

232. The policy of secret detentions and renditions pursued by the current US administration has created a dangerous precedent of dehumanisation. Many of the people caught up in the CIA's global spider's web[208] are rightly described as "ghost prisoners"[209] because they have been made invisible for many years.[210]

233. Meanwhile the US Government's descriptions of its captives in the "war on terror" can only serve to exacerbate this dehumanising effect. The Administration routinely speaks of "aliens", "deadly enemies" and "faceless terrorists," with the clear intention of dehumanising its detainees in the eyes of the American population. The NGO community, for its part, calls them "ghost prisoners".

234. By characterising the people held in secret detention as "different" from us – not as humans, but as ghosts, aliens or terrorists – the US Government tries to lead us into the trap of thinking they are not like us, they are not subjects of the law, therefore their human rights do not deserve protection.

235. President Bush has laid this trap on multiple occasions as a means of diverting attention from the abusive conditions in which certain detainees in US custody are being held.[211] Our team heard first-hand how distinctions are drawn in the mind of guards and interrogators: in an interview with one of our CIA sources who has extensive knowledge of detainee treatment, we asked whether a known form of detainee treatment should be considered as abusive. "*Here's my question,*" replied our source. "*Was the guy a terrorist? 'Cause if he's a terrorist then I figure he got what was coming to him. I've met a lot of them and one thing I know for sure is that they ain't human – they ain't like you and me.*"

236. Yet what has struck me most often as I have examined the cases of scores of people held in secret detention – some of whom I have met – is precisely the opposite: these detainees' ordeals have affected me profoundly as I have always thought of them as fellow human beings. The worst criminals, even those who deserve the harshest punishment, must be given humane treatment and a fair trial. This, moreover, is what makes us a civilised society.

237. It is for these reasons that we must combat their being seen as "ghost prisoners" by repeatedly pointing out that persons detained in the course of counter-terrorist operations are and remain human beings whose human rights must be protected and who are entitled to humane treatment as laid down in the ECHR. In this section of my report I have set out expressly to place the emphasis on the human aspects of these people held in secret detention.

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[208] For the most comprehensive and authoritative known list of persons detained at one point by the United States, and whose fate and whereabouts remain unacknowledged, see the following report produced jointly by six leading human rights organisations: Amnesty International, Cageprisoners, Center for Constitutional Rights, Center for Human Rights and Global Justice at NYU School of Law, Human Rights Watch and REPRIEVE, "Off the Record – US Responsibility for Enforced Disappearances in the 'War on Terror'," 7 June 2007, available at http://www.chrgj.org/docs/OffRecord/OFF_THE_RECORD_FINAL.pdf.

[209] See, for example, various reports by Human Rights Watch: most recently "Ghost Prisoner – Two Years in Secret CIA Detention", HRW Volume 19, No. 1(G), February 2007, available at http://hrw.org/reports/2007/usa0207/usa0207webcover.pdf; and earlier "List of 'Ghost Prisoners' possibly in CIA custody", 30 November 2005, available at http://hrw.org/english/docs/2005/11/30/usdom12109.htm.

[210] In its report entitled "USA / Yemen: Secret Detention in CIA 'Black Sites'", Amnesty International described how one detainee had been transformed from a person his father described as a "very gentle man, who is always laughing", to someone who sat through an encounter with "never even the ghost of a smile on his face". See AI Index: AMR 51/177/2005, 8 November 2005, available at http://web.amnesty.org/library/index/engamr511772005: at page 2.

[211] The speech delivered by President Bush on 06.06.2006 is a prime example of the type of rhetoric used to convince the audience that the people in US custody are inhuman and undeserving of empathy. The speech is strewn with references to "dangerous men", "terrorist enemies" and "those who kill Americans". Talking about Guantanamo Bay, President Bush states: "It's important for Americans and others across the world to understand the kind of people held". In his conclusion, President Bush states: "The adversaries are different... We're fighting for the cause of humanity, against those who seek to impose the darkness of tyranny and terror upon the entire world."

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instructed to walk along an isolated path without looking over his shoulder. He said he feared that he was "about to be shot in the back and left to die," with nobody having any idea of how he had got there.

278. In the ensuing three years, Mr El-Masri's case has been investigated and reported extensively, including by the *Untersuchungsausschuss* of the German Bundestag and by German prosecutors, both of which I shall address below. Yet a key piece of the jigsaw, namely the means by which Mr El-Masri was returned from Afghanistan to an unknown point in Europe[221], has eluded investigators until now.

279. Today I think I am in a position to reconstruct the circumstances of Mr El-Masri's return from Afghanistan: he was flown out of Kabul on 28 May 2004 on board a CIA-chartered Gulfstream aircraft with the tail number N982RK to a military airbase in Albania called Bezat-Kuçova Aerodrome.[222] We have obtained primary data on this extraordinary homeward rendition from three separate sources and we are able to publish the relevant flight logs from the Marty Database as an appendix to this report.[223]

280. Our team was first alerted to an unusual "flight circuit" through European airspace on the date in question by a submission from the national aviation authorities of Bosnia and Herzegovina (BiH).[224] The submission cited three "diplomatic permissions for state aircraft," which it said had been issued in relation to "flight movements for the needs of CIA, USA." The most relevant of these permissions, of which I subsequently obtained a copy,[225] was described as follows:

> "On the 26 May 2006 permission [was] issued to the company "RICHMON AVIATION" [sic] for traveller charter flight on the day of 28 May 2004. Line: Auki/Gwaunaru'u – Sarajevo – Prag. Aircraft type: Gulstrim III, Registration N982RK, which is also its call sign."

281. Three elements of this permission caught our attention: the role of the charter company Richmor Aviation;[226] the outlandish notion that a Gulfstream III would fly to Sarajevo from the Solomon Islands airport of Auki/Gwaunaru'u;[227] and the mention of 28 May 2004, which we knew as the date on which Khaled El-Masri was released. The first of these elements was the key to our locating the flight logs for the N982RK aircraft; the second was evidence of a smokescreen on the part of the CIA to cover up the aircraft's actual arrival from Bezat-Kuçova Aerodrome; and the third was the match we had been looking for to solve the mystery of the circumstances of Mr El-Masri's return to Europe.

[221] See El-Masri statement to US Court in Alexandria, 08.04.2006, at p. 21. "Sam", a German-speaking official who accompanied Mr El-Masri on this flight, told him that he "would eventually land in a European country but that it would not be Germany itself."

[222] The military airbase in question appears to have two variations on its name: the first is Bezat-Kuçovë; the other is Berat-Kuçovë. The airbase is denoted by the ICAO code LAKV. It is situated in the south of Albania, between the towns of Vlorë and Korcë, about 40 miles (64 km) south of the capital Tirana. The airbase underwent a comprehensive renovation and upgrade between 2002 and 2004 in order to bring it into line with NATO standards, as part of Albania's NATO accession process.

[223] See Appendix No. 3 to the present report, entitled "Flight logs related to the secret 'homeward rendition' of Khaled El-Masri in May 2004."

[224] Submission No 02-292.7-626-6/06, "Report on flight movements", prepared by Mr Đorđe Ratković, Director General, Directorate for Civil Aviation in the BiH Ministry of Transport and Communications, Sarajevo, 17.05.2006; attached to the letter to me from Mr Elmir Jahić, Chairperson of the BiH Delegation to PACE, Sarajevo, 14.06.2006.

[225] Permission No. 292.7-361/04 issued by Hasan Hadžopašić, Senior Advisor for Flight Authorisation, Directorate for Civil Aviation in the BiH Ministry of Transport and Communications, Sarajevo, 26.05.2004; sent as a fax to "Richmon [sic] Aviation", USA; attached to the letter to me from Ajša Campara, Secretary General of the BiH Delegation to PACE, "Report on flight movements – copies of permissions issued", Sarajevo, 6.01.2007.

[226] We were familiar with Richmor Aviation as the operator of the aircraft with the tail number N85VM, which was used in the CIA's rendition of the Egyptian cleric Abu Omar on 17.02.2003. See Appendix No. 4 to the Marty Report 2006, "Flight logs related to the rendition of Abu Omar."

[227] Quite apart from the fantastical route, the N982RK aircraft's maximum flight capacity of 6 hours 52 minutes, as listed in the "data strings" I have obtained, would make it impossible to complete this journey.

282. We have since received confirmation from CIA insiders that Albania was indeed the country to which the Agency opted to send Mr El-Masri from Afghanistan. We were told by these American sources that originally the CIA had asked "the former Yugoslav Republic of Macedonia" whether it would accept a "reversal" of the January 2004 rendition, but that this approach was instantly rejected: *"You can imagine that was the last thing the Macedonians wanted! They had no reason to take the problem back."*

283. The CIA's second choice of Albania was favourable from a geographical point of view since it opened the option to drive Mr El-Masri to the Macedonian border immediately upon arrival and thus set him free in a state of disorientation that might diminish his credibility if he went public with his story. From a policy point of view, Albania has also proven to be a willing bilateral partner in providing the United States with a "dumping ground"[228] for its unwanted detainees in the "war on terror." At least eight former inmates of Guantanamo Bay remain stranded in Albania[229] because their refugee status does not allow them to go home to their families.

284. At the end of his own ordeal, Mr El-Masri was not shot in the back but instead confronted by police guards at a checkpoint on what appeared to be the border between "the former Yugoslav Republic of Macedonia" and Albania. From there he was driven for about six hours to Tirana, Albania's capital city, and sent home to Germany on a commercial flight from Mother Theresa Airport to Frankfurt. He received a boarding card for this final flight and an Albanian exit stamp in his passport for 29 May 2004.

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285. There have been other new developments concerning in particular the activities of the prosecutor's office in Munich, the proceedings in the German Bundestag's parliamentary committee of inquiry (*Untersuchungsausschuss/UA*), Mr El-Masri's civil lawsuit against the CIA before US courts, and, last but not least, his personal situation.

286. The case against Mr El-Masri's kidnappers before the Munich prosecutor's office is still pending. Upon the initiative of the prosecutor, international arrest warrants were launched against 13 suspected CIA agents in January 2007.[230] The Bavarian judicial authorities did not in any way interfere with the launch of these arrest warrants, but no progress has as yet been made in apprehending the persons concerned or even identifying them by their actual names.

287. In Germany – in contrast to Italy - it is not possible to try suspects *in absentia*. In reply to a formal request for judicial cooperation addressed to the Macedonian authorities in early 2006, the prosecutors were given only the "official version" of the events as already publicly stated by the authorities.[231]

288. Nor has any progress been made in identifying "Sam", the German-speaking agent who, it is claimed, accompanied Mr El-Masri home from Afghanistan[232]. It was revealed recently[233] that then Interior Minister Schily was personally present in Kabul at the time when "Sam" announced to Mr El-Masri that he would soon be repatriated. But the prosecutor sees no link between Mr Schily's presence and the allegations made by Mr El-Masri himself that "Sam" was in fact a German federal agent.

[228] The phrase "dumping ground" is used by the US lawyer of five Uighur Muslims from western China who were sent to Albania in May 2006 upon their release from Guantanamo Bay; see BBC News Online, 'Albania takes Guantanamo Uighurs', available at http://news.bbc.co.uk/2/hi/europe/4987944.stm.

[229] See, for example, BBC News, "Guantanamo refugee runs asylum deal," 18.05.2007, available at http://news.bbc.co.uk/2/hi/uk_news/6664187.stm. The nationalities of the eight men in Albania are listed as: an Algerian, an Egyptian, an Uzbek and the five Uighurs.

[230] In its press release of 31.01.2007, the Prosecutor's Office acknowledged having received additional information from the Milan Prosecutor's Office and from the Council of Europe's Rapporteur, Dick Marty.

[231] See Marty report 2006, supra note 6, p. 27, §§ 109-111.

[232] See Marty report 2006, supra note 6, p. 26, §§ 99-100, p. 27, § 103, p. 32, § 130.

[233] See n4o, 23.11.2006.

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289. It has been revealed that the telephones of Mr El-Masri's lawyer, Mr Grijdic, were tapped from January until May 2006 on the instructions of the prosecutor's office. At the time, there were also long conversations between Mr Grijdic and my collaborator as part of the mandate given to me by the Parliamentary Assembly. The prosecutor in charge[234] informed me that the reason for the wire-tap, which was court-approved as provided for by law[235], was to document any possible attempts made by the suspected kidnappers to contact Mr Grijdic with a view to offering Mr El-Masri a settlement. As no such contacts were made, however, the wire-tap was terminated. Mr Grijdic, who had not been informed of this wire-tap in advance, appealed against the decision authorising the surveillance. Its extension beyond March was found unlawful on appeal, but the legality of the initial wire-tap was upheld. Mr Grijdic then lodged a constitutional complaint (*Verfassungsbeschwerde*) against the authorisation of the initial wire-tap before the Federal Constitutional Court (*Bundesverfassungsgericht*). In submissions to this court,[236] the Federal Ministry of the Interior commented that if it found the wire-tap justified. On 17 May 2007, the Federal Constitutional Court held that the wire-tap had violated Mr Grijdic's constitutionally protected right to privacy.

290. Whilst the Bundestag's parliamentary committee of inquiry (UA) has not yet completed its work, it is now undisputed in this body that Mr El-Masri's account of his ordeal is true[237]. This means that there is no longer any doubt that the Macedonian authorities' official version is inaccurate[238]. This confirms our belief that the latter consciously concealed the truth.

291. Disagreement between the representatives of the German Government and opposition parties in the Bundestag committee of inquiry continues to exist as to the extent to which different German authorities were involved or at least informed of Mr El-Masri's case, and when. The testimonies of a Telecom employee and a junior member of the German intelligence services – claiming that Macedonian officials informed the German embassy in Skopje of Mr El-Masri's detention before he was transported to Afghanistan - were not considered by the majority of the committee to be sufficiently conclusive to be able to hold the political leadership accountable[239].

292. More generally, opposition members on the committee have voiced their frustration that the executive is limiting the possibility for the committee to elucidate the truth by invoking official secrecy, refusing access to key files or testimony on this ground. Information relating to the "core field of executive privilege" and information which must be kept secret in the higher interests of the state (*Staatswohl*) is not available to the UA even when meeting in camera. It is the executive itself which decides what information falls into this category, apparently without any parliamentary control; the current trend is to extend this concept of knowledge restricted to the executive, a move which has come in for much criticism from the members of the UA. The latter have recently decided to refer this matter to the Federal Constitutional Court[240]. Even classified information which does not fall into this category has to be dealt with in camera by the committee, which means that it cannot be publicised by the members of the UA; this too has been criticised by some members of the Bundestag[241].

293. Prosecutor Hofmann, who also testified before the UA, had transmitted the entire case file to the committee, including elements that were classified as secret. But during his public testimony, he was obliged to withhold his answers to certain questions relating to classified documents. His offer to discuss the classified material in a closed session was not taken up, although this procedure had been followed for other witnesses.

[234] Mr Martin Hofmann, whom I met in December 2006 in Geneva. I should like to thank Mr Hofmann for his kind cooperation.
[235] A prolongation of the wire-tap was subsequently refused by the competent judge.
[236] On file with the rapporteur.
[237] According to Max Stadler, Liberal member of the Bundestag's committee of inquiry and the *Parlamentarischer Kontrollgremium (PKG)* who spoke with a member of our team on 26.06.2007, this is the opinion of all members, including those from the party currently in power.
[238] Mr Stadler, *supra note 230*, indicates that this is also the view of the committee of inquiry, which does not however believe that its terms of reference allows it to record this officially.
[239] The political leadership could only be held responsible for "organisational error" for failing to report back with the relevant information in good time.
[240] Tagesthemen.de of 21.05.2007, citing Dr. Max Stadler (Liberal).
[241] Mr Stadler has alluded to "organised leaks" by members of government parties designed or at least objectively likely to mislead the public on the substance of the in camera discussions – one case in point was the private hearing of officers who had interrogated Mr Kurnaz in Guantanamo Bay and the matter of the American "offer", apparently refused by the German authorities, to allow Mr Kurnaz to be repatriated.

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294. As a result of the UA's work, the German government and government departments have been made more aware of human rights aspects and the rule of law[242]. The UA recently agreed to avail itself, for the first time, of the possibility provided for in the law governing committees of inquiry to appoint a "special investigator" with effect from the summer 2007 parliamentary recess, tasked on behalf of the UA with looking into the CIA rendition flights[243].

295. Meanwhile Mr El-Masri's civil lawsuit in the United States against the CIA is entering its final phase: an appeal to the US Supreme Court, after the rejection of his case on grounds of state secrecy in the first instance, upheld by the court of appeal[244], was announced by Mr Grijdic on 30 May 2007.

296. Against this background, Mr El-Masri himself is still suffering severely from the psychological consequences of the ordeal he has gone through. He has been repeatedly victimised by personal attacks in the local media and has been unable to find employment in the last three years. In January 2007, he lashed out physically at a vocational training officer, who he felt had treated him unfairly. On 17 May 2007, he was arrested in Neu-Ulm as a suspect in a case of arson and placed in a psychiatric hospital[245]. This dramatic development in Mr El-Masri's personal situation merely confirms the repeated claims by his lawyer, Mr Grijdic, that Mr El-Masri is in desperate need of immediate professional psycho-social post-traumatic care[246]. According to his current therapist[247], the conflict between his post-traumatic care and the pressure arising from the various ongoing procedures to establish the truth simply adds to Mr El-Masri's problems.

297. It is therefore all the more regrettable that Mr El-Masri has not yet been given an official apology for the abuses he has suffered, despite the fact that Mr Schily has stated before the *Untersuchungsausschuss* that Mr El-Masri is innocent and that the Americans have long since offered their own apology to the German Government.

298. I have the following comments regarding these developments in the El-Masri case.

b. The "legal vacuum": denial of accountability to El-Masri in Germany and in the United States

299. In the present state of affairs, Mr El-Masri is unable to hold accountable those responsible for his ordeal both in Germany and in the United States. The core of the problem is the doctrine of state secrecy, which at present constitutes an absolute obstacle to the effective prosecution of Mr El-Masri's kidnappers in Germany, the full clarification of responsibilities in the *Untersuchungsausschuss* and Mr El-Masri's civil lawsuit against the CIA in the United States.

300. As Mr Grijdic has said so aptly in his complaint against the wire-tap of his law office: whilst the domain of professional secrecy - the traditionally protected relationship between lawyers and doctors and their clients, journalists and their sources - is gradually shrinking, the realm of state secrecy is increasingly expanding. "Equality of arms" - part of the "fair trial" requirements under Article 6 ECHR - becomes a hollow phrase under these conditions[248].

[242] Mr Stadler gave as an example an apparently similar case of a long-term German resident arrested in Pakistan who was able to return to Germany without the government raising the objections it did in the case of Mr Kurnaz; a second example is the approach adopted by the Bundestag's Legal Affairs Committee to a bill to facilitate information exchange between executive services in the fight against terrorism. The Committee insisted on including measures to prevent this being misused for rendition purposes.
[243] Mr Stadler insisted that this "special investigator" would not be replacing the Committee but would be preparing the way by carrying out preliminary investigations which would facilitate the UA's subsequent work.
[244] No 06-1667 of 02.03.2007 (4th circuit).
[245] He is suspected of having laid fire to a wholesale market in Neu-Ulm (cf. Spiegel online 17.05.2007).
[246] Letter from Mr Grijdic to Chancellor Merkel of 26.04.2007, passed on to the Bavarian Prime Minister's Office by letter from the Chancellor's office of 11.05.2007 with a request to take this issue up as a matter of urgency (copy of both letters on file); since February 2006, Mr El-Masri has received limited therapy (70 hours) from the treatment centre for torture victims in Neu-Ulm, but this therapy was considered as insufficient both by Mr Grijdic and by the therapist herself (cf. SPIEGEL-online 18.05.2007). Although Mr El-Masri had asked for treatment at the centre shortly after his return to Germany in 2004, it took until 2006 for Mr Grijdic to obtain the required health insurance funding agreement to start his limited treatment.
[247] Cf. Spiegel-online, 18.05.2007 (interview with Ms Gerlinde Odisch).
[248] Mr Grijdic's graphic comparison : the lawyer gets to fight with a pocket knife, the executive with a sword.

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301. The US Supreme Court, if it chooses to hear Mr El-Masri's case, and the German Federal Constitutional Court, following the appeal lodged by the minority representatives of the Bundestag's committee of inquiry, will have to take a position on the extent to which the executive is allowed to act in complete secrecy, without the possibility for either judicial or parliamentary scrutiny of its actions. Here, we have on the one hand lawyers and judges – in favour of judicial and/or parliamentary control, and on the other the executive, and in particular the intelligence agencies and other special services, claiming the freedom to act in secrecy on the pretext of the supposed higher interests of the state. Mr Grijldic's constitutional complaint, in contrast, has led to a clearer definition of the realm of professional secrecy.

302. These are undeniably key issues for the defence of human rights and for the fight against terrorism. Short-circuiting the different mechanisms of judicial and parliamentary control does not make the fight against terrorism more effective. Rather, this vacuum can lead to arbitrary action and all sorts of dysfunctioning. While certain operational means must of course remain confidential, there is nothing to prevent making provision for transparent procedures for subsequent review. Continuing to invoke state secrecy years after the events is unacceptable in a democratic society.

303. Moreover, state secrecy cannot in any circumstances justify or conceal criminal acts and serious human rights violations. From the point of view of the rule of law, the ruling of the US Court of Appeal (4th circuit) in Mr El-Masri's case[242] is disappointing and regrettable: whilst the Court of Appeal acknowledges that it is for the courts to decide on the extent of state secrecy[243], it takes a very restrictive stance as to the scope of judicial review, insisting on the court being obliged to accord the "utmost deference" to the responsibilities of the executive branch[244]. This "deference" goes so far that "in certain circumstances a court may conclude that an explanation by the Executive of why a question cannot be answered would itself create an unacceptable danger of injurious disclosure. [...] In such a situation, a court is obliged to accept the executive branch's claim of privilege without further demand"[245].

304. One may legitimately ask how such reasoning can be reconciled with the fundamental principles of the rule of law. The case law of the US Supreme Court cited in support of this wide interpretation of the state secrecy doctrine[246] dates back to the 19th century and the worst periods of the Cold War, when there was an almost blind trust in the infallibility and incorruptibility of its secret services. It is therefore to be hoped that the United States Supreme Court will use the opportunity of the El-Masri case to take a fresh approach to and modernise the "state secrets doctrine", to bring it into line with the principle of the separation of powers and the requirement for transparency in a genuinely democratic society.

305. In *Fitzgerald*[247], another United States Court of Appeal rightly points out that "*[w]hen the state secrets privilege is validly asserted, the result is unfairness to individual litigants – through the loss of important evidence or dismissal of a case – in order to protect a greater public value.*" How can it be seriously argued that information establishing the responsibility of State officials in serious violations of human rights is of "a greater public value" deserving protection in a democratic society?

[242] No 06-1667 of 02.03.2007
[243] Quoting the US Supreme Court in *Reynolds* (345 US at 8-10) "[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers"
[244] Again quoting the US Supreme Court (*Nixon*, 418 US at 710)
[245] Court of Appeal (*supra* note 240) p. 12, with references to the US Supreme Court's *Reynolds* judgment (345 US at 9).
[246] The *Reynolds* case dates back to 1953; another leading case (*Totten v. United States*, 92 US 105) to 1875, and the *United States v. Nixon* (418 US 683) to 1974; *Chi & S. Air Lines, Inc., v. Waterman S.S.Corp.*, 333 US 103, 111 to 1872
[247] 776 F.2d at 1238 n.3 (cited by the Court of Appeal in the El-Masri case, *supra* note 240, p. 23)

306. The principle of judicial self-restraint is certainly a good thing, but this is truly corrupted when it results in a denial by the judicial system of its own role, leading to impunity for the perpetrators of serious human rights violations.

307. Judges, prosecutors and lawyers cannot *a priori* be considered national security risks, any more than other agents of States themselves. If necessary to safeguard legitimate state secrets that may well be intertwined with illegitimate ones, judicial personnel participating in proceedings involving state secrets can be subjected to a specific clearing or vetting procedure, as is done in a number of jurisdictions, and placed under an obligation to maintain the secrecy of the information they are given access to[248].

308. In order to ensure accountability, information pertaining to serious human rights violations committed by agents of the executive should not, and need not be permitted to be shielded by the notion of state secrecy or national security.

309. What applies to courts must also apply to parliamentary committees of inquiry: the executive must not be allowed to thwart inquiries into its own possible wrongdoings by classifying relevant information.

c. The German parliamentary committee of inquiry and the work of the prosecutors in Munich

- The Bundestag committee of inquiry

310. The German parliamentary committee of inquiry responsible for establishing the facts in the El-Masri case is emblematic. Of course the *Bundestag*'s decision to conduct a serious inquiry into the case of Mr El-Masri and into possibly reprehensible activities by the German special services is welcome. It is, however, regrettable that most members of the committee have to date been content to receive documentation that has been rendered "very illegible by government censorship. The committee has also frequently been quick to accept the reasons given by witnesses for refusing to give evidence: on each occasion, "state secrecy" or the so-called doctrine of *exekutive Eigenverantwortung* (the domain of the executive's own responsibility, exempt from parliamentary scrutiny) has been accepted. It should also be made clear that the standing committee responsible for supervising the activities of the secret services (*Parlamentarisches Kontrollgremium (PKG)*) has access to secret information[249], and that the parliamentary committee of inquiry was granted access behind closed doors both to classified documents and to witness testimony on matters classified as secret. What is in dispute between majority and minority representatives is the extent to which parliamentarians can demand access to classified materials, and what use they can make of it in public if they consider that the matter in question requires their constituents to be informed. This matter needs clarification, generally and also for future reference. The parliamentary committee of inquiry is fulfilling its supervisory remit in the interest of parliament as a whole, and its work must not be primarily influenced by considerations of short-term political rivalry[250]. Any majority, in a democratic system, can become the minority at the next election, and should have an interest in protecting parliamentary scrutiny of executive action. I therefore welcome the decision of the opposition representatives on the parliamentary committee of inquiry to apply to the Federal Constitutional Court for a clearer definition of the scope of the doctrine of the executive's own responsibility (*exekutive Eigenverantwortung*)[251].

[248] In the same way as the procedure described by the 4th Circuit Court of Appeals (*supra* note 240, pp. 11-12 and 21-22) for the judicial review of the issue whether the information sought to be protected qualifies as privileged under the state secrets doctrine.
[249] On the other hand, this body has no power to summon witnesses. The government is under an obligation to "report" to the PKG, but there is no statutory obligation (subject to criminal penalty) like that which exists for witnesses summoned by a committee of inquiry, for the executive's representatives on the PKG to tell the truth.
[250] As seems to be the case, according to Mr Stadler, within the German parliamentary committee of inquiry: while the representatives of government parties, especially the Christian Democrats who were in the opposition at the material time, take a very active and open attitude during the examination of witnesses, government discipline comes fully into play when the facts are being assessed, with the representatives of government parties never having voted for a motion to take evidence (*Beweisbeschluss*) tabled by minority representatives or having tabled such a motion themselves.
[251] cf. tagesschau.de of 21.08.2007, announcing the appeal to the Federal Constitutional Court.

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[illegible] its resources and let it die than to kill every insurgent [because] dynamic insurgencies can replace losses quickly. Skilful counterinsurgents must thus cut off the sources of that recuperative power." One such source is said to be the status afforded to an insurgent by his enemy.

[illegible] ...&ct=1180092011-m6KeJwmiPYbDzy[illegible]OxCA
[illegible] See Steve Kleinman, "Barriers to Success: Critical Challenges in Developing a New Educing Information Paradigm," excerpts taken from pp. 254, 256 and 286, in *Intelligence Science Board*, "Educing Information", supra note 308, at pp. 235-386.

359. I support unambiguous, transparent and strictly enforced rules on CIA detainee interrogation. The Executive Order that President Bush "shall issue" imminently[310] should be published in full and should expressly outlaw not only the abhorrent practice of "water boarding," but also techniques like slapping, stress positions, sleep deprivation and extremes of temperature. I note that even the Army Field Manual of September 2006 leaves open the possibility that such techniques are not prohibited, so that manual does not strike me as an appropriately robust set of minimum standards. When the long-awaited rules for the CIA are finally issued, they must set higher, clearer thresholds that maintain the integrity of these important interrogations.

iii. Perceptions of the HVD programme and its likely reactivation

360. At the time of his 6 September 2006 speech, President Bush lauded the HVD programme as a policy that "*has been, and remains, one of the most vital tools in our war against the terrorists*". In the experience of our team during this inquiry, the President's view is largely shared among those officers who had knowledge of the programme. With only very few exceptions, the majority of our sources in the CIA and the wider intelligence community have described the HVD programme as a success, or in one case "*about as good as it could have turned out*".

361. The following is an excerpt from our interview with a senior US intelligence source:

> "I think you have to understand that the programme we ran through 2005, into 2006 to handle the HVDs was both needs-oriented and results-oriented. We needed to show that we could capture those responsible for 9/11, break down key Al-Qaeda cells at their source, and keep the threat of terror attacks as far away from the American people as possible. We needed to work with our most trusted allies to avoid leaks that would endanger national security – ours or theirs. The results speak for themselves.
>
> And if you look at our situation now, the needs are different from the immediate post-9/11 period. Bringing those 14 HVDs to Guantanamo – the Zubaydahs and the KSMs – was like drawing a line under that programme in the way it had been operating, as a lot of guys weren't happy going on with it. Sure, there'll be something else to replace it, but we don't know what that looks like yet."

362. Our sources have stated categorically to us that from the perspective of the CIA officials who operated it, the specific aspects of the "High-Value Detainee" programme on which this report concentrates – including the European "black sites" – belong to a chapter of the post-9/11 story that is essentially closed.

363. At first sight, this analysis appears valid. The 14 HVDs whom our sources agreed to discuss with us (at least on a limited basis) have been transferred to and are all now held at Guantanamo Bay. They have received visits from representatives of the International Committee of the Red Cross (ICRC), which indicates that their fundamental rights as detainees have at last been regularised, at least as far as this particular aspect is concerned. They are no longer regarded as having high "live" intelligence value for the CIA or the US Government,[311] and so they were subject to Combatant Status Review Tribunal (CSRT) proceedings in early 2006 to rubber-stamp their status as "unlawful enemy combatants". Ultimately, these HVDs will be among the first detainees to be charged with specific offences in individual military commissions processes.

[310] According to the Military Commissions Act 2006, at §§ 6(a)(3)(A) and (B), the President "shall issue" an Executive Order containing authoritative interpretations of the "meaning and application of the Geneva Conventions" that would then apply to interrogations carried out by the CIA. Recent news reports have stated that a lengthy deliberative process involving lawyers in the State Department, the White House, Directorate of National Intelligence and the Department of Defense would most likely lead to this Executive Order being published before the summer of 2007; see, for example, Mark Mazzetti, "CIA Awaits Rules on Terrorism Interrogations," in *The New York Times*, 26.03.2007, available at: http://www.nytimes.com/2007/03/26/washington/25interrogate.html?ex=1332476800&en=27c0814347930512&ei=5088&partner=rssnyt&emc=rss

[311] See Remarks by President Bush, 06.09.2006, *supra* note 9: "*We have largely completed our questioning of the men – and to start the process for bringing them to trial, we must bring them into the open*". One of our sources also conceded that having held these detainees for several years in incommunicado detention, it would be "disingenuous" to say that they are still "live intelligence assets".

364. On the other hand, however, there can be little doubt that the Bush Administration is prepared to resort once again to some form of CIA detention and interrogation regime in the future. If President Bush's claim on 6 September 2006 that "*there are now no terrorists in the CIA program*" represented the closing of one chapter, then his very next sentence heralded the opening of another: "*But as more high-ranking terrorists are captured, the need to obtain intelligence from them will remain critical – and having a CIA program for questioning terrorists will continue to be crucial to getting life-saving information*".[312]

365. Indeed, there are clear indications that the HVD programme has been reactivated in recent months. The transfer of Abd Al-Iraqi to Guantanamo Bay in April 2007[313] bore strikingly similar characteristics to the 14 transfers in September 2006: during his several months in CIA detention prior to his transfer to Cuba, he appears to have been kept incommunicado and subjected to interrogation at an unknown site.

366. Indeed Al-Iraqi's handover to the Department of Defense only after his intelligence value to the CIA had been completely exploited would seem to confirm this statement from one of our intelligence sources: "*The CIA has gone from having no interest in interrogation to being the agency of preference in this area. We'll only give them up to the DoD once we've got everything we can out of them.*"

iv. Concluding thoughts

367. It is my sincere hope that my report this year will catalyse a renewed appreciation of the legal and moral quagmire into which we have collectively sunk as a result of the US-led "war on terror." Almost six years in, we seem no closer to pulling ourselves out of this quagmire, partly because of the absence of factual clarity – perpetuated by secrecy, cover-up and dishonesty – about the exact practices in which the US and its allies have engaged, and partly because a lack of urgency and political will on both sides of the Atlantic to unite around consensus solutions.

368. By clarifying some of the unspoken truths that have previously held us back in this exercise, I hope I have spurred right-minded Americans and Europeans alike into realising that our common values, in tandem with our common security, depend on our uniting to end the abusive practices inherent in US policies like the "High-Value Detainee" programme.

[312] See Remarks by President Bush, 06.09.2006, *supra* note 9. Also, for the President's interpretation of the CIA programme's status under the revised law, see The White House, Office of the Press Secretary, "President Bush Signs Military Commissions Act of 2006", 17.10.2006, available at http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html: The Act, he said, "will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives."

[313] See US Department of Defense, "Defense Department takes custody of al-Qaeda leader," 27 April 2007, available at http://www.defenselink.mil/releases/release.aspx?id=4094